

*November 25, 2003*

## **Wilmington District Process for Preservation of Mitigation Property**

The Wilmington District Regulatory Branch (District), consistent with Corps of Engineers guidance, often accepts or requires the preservation of property, primarily wetlands or other waters, as compensatory mitigation to offset impacts to waters or wetlands authorized by permits issued pursuant to Section 404 of the Clean Water Act. Property preserved may be either existing, high quality wetlands or other waters, or property on which work is performed to restore, enhance, or create waters or wetlands. In addition, property preserved may be high ground, preserved in order to enhance or protect adjacent wetlands or other waters (e.g., stream buffers). The purpose of this document is to outline what the District generally considers necessary to adequately preserve property offered as compensatory mitigation. It does not address issues of when preservation is necessary, or what types, quality, or quantity of compensatory mitigation is adequate to offset authorized impacts.

As an initial matter, unless the proposed mitigation is a mitigation bank or use of an in-lieu fee program (e.g., the North Carolina Wetlands Restoration Program (NCWRP) or the Ecosystem Enhancement Program (EEP)), the permittee must have a sufficient interest in the mitigation property to implement the mitigation plan, including preservation of property. Fee ownership is preferred.

The District generally considers preservation of property for compensatory mitigation purposes to consist of maintaining the property in its natural condition, or, if restoration, creation, or enhancement work has been performed on the property, in its mitigated condition. The District generally expects that (other than District- approved construction to enhance, restore, or create waters or wetlands) prohibited activities on the property will include all construction, grading, filling, excavating, ditching, draining, as well as the removal, cutting, mowing, burning or harming of vegetation. Some activities on the property will generally be allowed, such as hiking, fishing, and hunting. Model preservation documents at Attachments A-C provide a more detailed explanation of what the District considers to be adequate preservation.

Preservation of property is a component of a complete mitigation plan. Preparation of acceptable mitigation plans is the responsibility of the applicant. Mitigation plans should include an adequate description of the property to be preserved and a description of the activities that will be limited and allowed on the property. The plan should also identify the type of preservation mechanism proposed to be used; identify the owner of the mitigation property; and identify the proposed recipient of the preservation interest, if applicable. Although it is not required that the proposed document implementing the preservation of the property be submitted with the mitigation plan, permits will generally not be issued until the proposed document has been approved by the Corps.

Permits will generally require that the approved preservation mechanism be properly executed and recorded within 30 days of permit issuance. The District may exercise flexibility here where it appears there is no immediate threat to the property; the terms of the preservation mechanism have been agreed to by all necessary parties; and legitimate reasons for a limited extension of time exist.

There are several preservation mechanisms applicants may propose to use to preserve mitigation property, including, in general order of preference, conservation easements, restrictive covenants, and conservation declaration of restrictions. Fee conveyance to an acceptable conservation organization may also be acceptable. Subjecting property to any of the preservation mechanisms outlined impacts the property owner's rights, and the preservation document should be drafted by an attorney representing the property owner, using the appropriate model document. Other preservation mechanisms may be proposed by applicants, working with their attorney.

Preservation property must be adequately described in the preservation document. This can be achieved by means of a metes and bounds description taken from a recent survey of the property, or a recorded survey identifying the property. Where practicable, the survey should show the location of any easements or rights of way on the property, as well as the location of any features or facilities the grantor desires to reserve rights to use, maintain, repair, or replace.

Other than an appropriate fee conveyance, the District considers conservation easements to be the most effective form of property preservation, and will require them for all mitigation sites of any appreciable size, for those of particular value regardless of size for which a willing acceptable holder can be found, and for all mitigation banks. A model conservation easement is provided as Attachment A. Conservation easements proposed by applicants must comply with the model, unless the District approves modifications. To request a modification from the model, the applicant must submit the model with the modifications requested highlighted, and reasons for the requested changes explained in writing. Any request for modification should be sent to both the District's project manager for the proposed activity, and the District's Office of Counsel, P.O. Box 1890, Wilmington, North Carolina 28402.

Conservation easements require an approved holder. It is the responsibility of the applicant to locate an acceptable and willing holder; the District will not be the holder of such an easement. Approved holders must be qualified pursuant to N.C. Gen. Stat. § 121-35, and § 170(h) of the Internal Revenue Code. In addition, the District will require that the holder be either a recognized conservation organization, or a governmental entity that intends to enforce the conditions of the conservation easement. The District will not approve any holder unless it has some degree of confidence that the holder will monitor the preservation site, and enforce the terms of the easement. The District may consider such factors as the experience of the holder in managing preservation property; the purpose of the proposed holder, as reflected in its corporate charter or other organizational documents; the relationship of the proposed grantor, or permit applicant, to the proposed holder; and the plans of the holder in managing the property.

Property to be subject to a conservation easement should be free and clear of any prior liens or encumbrances that could adversely impact its value as mitigation property, including, but not limited to, timber or mineral rights vested in a third party; access, utility, or other easements that could allow a physical alteration of the property, and deeds of trust. Any deeds of trust on the property should be subordinated to the conservation easement. A preliminary title opinion will be required prior to issuance of the permit, and the permit will be conditioned to require a final title opinion upon recording of the conservation easement. This requirement may be satisfied if the grantee of the easement has a mechanism in place to assure it obtains good title to the conservation easement.

The District recognizes that there will be smaller mitigation sites for which it may be impractical to require a conservation easement; primarily where no acceptable holder is willing to accept the easement. That may be the case for single project mitigation required to compensate for impacts authorized by nationwide or regional permits. In the absence of other suitable third party holders, however, NCWRP will often agree to hold conservation easements for small sites. Where the District requires a conservation easement for NWP's and NCWRP agrees to be the holder, NCWRP's model conservation easement is acceptable to the Corps.

Where the District finds that a conservation easement is not practicable, it may accept another form of preservation; either a restrictive covenant associated with a subdivision of property, or a conservation declaration. Before accepting a preservation mechanism other than a conservation easement, the applicant may be required to provide a written description of what efforts it has made to locate an acceptable holder for a conservation easement.

Language for restrictive covenants for subdivisions, as well as a conservation declaration for property that will not be subdivided, can be found at Attachments B & C, respectively. Again, the District must approve any modification of this language; modification should be requested by showing proposed changes on the District's model language, with a written explanation of the reason for the requested modification.

LIST OF ATTACHMENTS

Model Conservation Easement; Attachment A ..... Page 5

Restrictive Covenant Guidance; Attachment B .....Page 13

Model Declaration of Restrictions; Attachment C .....Page 15

ATTACHMENT A; MODEL CONSERVATION EASEMENT

*January 18, 2001  
Rev'd October 16, 2002  
Rev'd August, 2003*

*Model Conservation Easement for use in preserving mitigation property. Language in italics is instructional, and should be deleted when site-specific Conservation Easement is prepared.*

PERMANENT CONSERVATION EASEMENT

THIS CONSERVATION EASEMENT ("Conservation Easement") made this \_\_\_\_\_ day of \_\_\_\_\_, 200\_ by and between \_\_\_\_\_, ("Grantor") and \_\_\_\_\_ (Grantee).

The designation Grantor and Grantee as used herein shall include said parties, their heirs, successors and assigns, and shall include singular, plural, masculine, feminine or neuter as required by context.

RECITALS

WHEREAS, Grantor owns in fee simple certain real property situated, lying and being in \_\_\_\_\_ County, North Carolina, more particularly described in Exhibit A attached hereto and incorporated herein ("Property");

WHEREAS, Grantee is [either a public body of this state, an agency of the United States, or a nonprofit corporation or trust whose purpose is the conservation of property], and is qualified to be the Grantee of a conservation easement pursuant to N.C. Gen. Stat. § 121-35;

WHEREAS, Grantor and Grantee recognize the conservation, scenic, natural, or aesthetic value of the property in its natural state, which includes the following natural communities: [describe by wetland and/or stream type, as well as any associated buffers or upland communities]. The purpose of this Conservation Easement is to maintain wetland and/or riparian resources and other natural values of the Property, and prevent the use or development of the Property for any purpose or in any manner that would conflict with the maintenance of the Property in its natural condition.

[ For use when the mitigation is offered for impacts of a single individual or general permit use] WHEREAS, the preservation of the Property is a condition of Department of the Army permit Action ID \_\_\_\_\_ issued by the Wilmington District Corps of Engineers, required to mitigate for unavoidable stream and/or wetland impacts authorized by that permit. Grantor and Grantee agree that third-party rights of enforcement shall be held by the U.S. Army Corps of Engineers, Wilmington District

(Corps, to include any successor agencies), and that these rights are in addition to, and do not limit, the rights of enforcement under said permit.

*[Alternate paragraph for use when the conservation easement supports a mitigation bank]* WHEREAS, the preservation of the Property is required by a Mitigation Banking Instrument for the [Name of Bank], Department of the Army Action ID [Action ID number for the mitigation bank]. The Mitigation Bank is intended to be used to compensate for unavoidable stream and/or wetland impacts authorized by permits issued by the Department of the Army. Grantor and Grantee agree that third-party rights of enforcement shall be held by the U.S. Army Corps of Engineers, Wilmington District (Corps, to include any successor agencies), and that these rights are in addition to, and do not limit, the rights of the parties to the Mitigation Banking Instrument.

NOW, THEREFORE, for and in consideration of the covenants and representations contained herein and for other good and valuable consideration, the receipt and legal sufficiency of which is hereby acknowledged, Grantor hereby unconditionally and irrevocably grants and conveys unto Grantee, its heirs, successors and assigns, forever and in perpetuity a Conservation Easement of the nature and character and to the extent hereinafter set forth, over the Property described on Exhibit A, together with the right to preserve and protect the conservation values thereof, as follows:

#### ARTICLE I. DURATION OF EASEMENT

This Conservation Easement shall be perpetual. This conservation Easement is an easement in gross, runs with the land and is enforceable by Grantee against Grantor, Grantor's personal representatives, heirs, successors and assigns, lessees, agents and licensees.

#### ARTICLE II. PROHIBITED AND RESTRICTED ACTIVITIES

Any activity on, or use of, the Property inconsistent with the purpose of this Conservation Easement is prohibited. The Property shall be preserved in its natural condition and restricted from any development that would impair or interfere with the conservation values of the Property.

Without limiting the generality of the foregoing, the following activities and uses are expressly prohibited, restricted or reserved as indicated hereunder:

A. Disturbance of Natural Features. Any change disturbance, alteration or impairment of the natural features of the Property or any introduction of non-native plants and/or animal species is prohibited.

B. Construction. There shall be no constructing or placing of any building, mobile home, asphalt or concrete pavement, billboard or other advertising display,

antenna, utility pole, tower, conduit, line, pier, landing, dock or any other temporary or permanent structure or facility on or above the Property.

C. Industrial, Commercial and Residential Use. Industrial, residential and/or commercial activities, including any right of passage for such purposes are prohibited.

D. Agricultural, Grazing and Horticultural Use. Agricultural, grazing, animal husbandry, and horticultural use of the Property are prohibited.

E. Vegetation. There shall be no removal, burning, destruction, harming, cutting or mowing of trees, shrubs, or other vegetation on the Property.

F. Roads and Trails. There shall be no construction of roads, trails or walkways on the property; nor enlargement or modification to existing roads, trails or walkways.

G. Signage. No signs shall be permitted on or over the Property, except the posting of no trespassing signs, signs identifying the conservation values of the Property, signs giving directions or proscribing rules and regulations for the use of the Property and/or signs identifying the Grantor as owner of the property.

H. Dumping or Storage. Dumping or storage of soil, trash, ashes, garbage, waste, abandoned vehicles, appliances, machinery or hazardous substances, or toxic or hazardous waste, or any placement of underground or aboveground storage tanks or other materials on the Property is prohibited.

I. Excavation, Dredging or Mineral Use. There shall be no grading, filling, excavation, dredging, mining or drilling; no removal of topsoil, sand, gravel, rock, peat, minerals or other materials, and no change in the topography of the land in any manner on the Property, except to restore natural topography or drainage patterns.

J. Water Quality and Drainage Pattern. There shall be no diking, draining, dredging, channeling, filling, leveling, pumping, impounding or related activities, or altering or tampering with water control structures or devices, or disruption or alteration of the restored, enhanced, or created drainage patterns. In addition, diverting or causing or permitting the diversion of surface or underground water into, within or out of the easement area by any means, removal of wetlands, polluting or discharging into waters, springs, seeps, or wetlands, or use of pesticide or biocides is prohibited.

K. Development Rights. No development rights that have been encumbered or extinguished by this Conservation Easement shall be transferred pursuant to a transferable development rights scheme or cluster development arrangement or otherwise.

L. Vehicles. The operation of mechanized vehicles, including, but not limited to, motorcycles, dirt bikes, all-terrain vehicles, cars and trucks is prohibited. *[The Corps will generally allow the use of vehicles on existing roads provided those roads are*

*identified by reference to a recorded map showing their location, configuration, and size.]*

M. Other Prohibitions. Any other use of, or activity on, the Property which is or may become inconsistent with the purposes of this grant, the preservation of the Property substantially in its natural condition, or the protection of its environmental systems, is prohibited.

### ARTICLE III GRANTOR'S RESEVERED RIGHTS

The Grantor expressly reserves for himself, his personal representatives, heirs, successors or assigns, the right to continue the use of the property for all purposes not inconsistent with this Conservation Easement, including, but not limited to, the right to quiet enjoyment of the Property, the rights of ingress and egress, the right to hunt, fish, and hike on the Property, the right to sell, transfer, gift or otherwise convey the Property, in whole or in part, provided such sale, transfer or gift conveyance is subject to the terms of, and shall specifically reference, this Conservation Easement.

*[For use when mitigation work (approved or required restoration, creation, or enhancement) is to be done on the property]* Notwithstanding the foregoing Restrictions, Grantor reserves for Grantor, its successors and assigns, the right to construct wetland and stream mitigation on the Property, in accordance with the *[describe mitigation plan by title, date and permit action id if a single mitigation site; if a mitigation bank, include the language "detailed mitigation plan approved in accordance with the Mitigation Banking Instrument for the \_\_\_\_\_ Mitigation Bank.]*

### ARTICLE IV. GRANTEE'S RIGHTS

The Grantee or its authorized representatives, successors and assigns, and the Corps, shall have the right to enter the Property at all reasonable times for the purpose of inspecting said property to determine if the Grantor, or his personal representatives, heirs, successors, or assigns, is complying with the terms, conditions, restrictions, and purposes of this Conservation Easement. The Grantee shall also have the right to enter and go upon the Property for purposes of making scientific or educational observations and studies, and taking samples. The easement rights granted herein do not include public access rights.

### ARTICLE V ENFORCEMENT AND REMEDIES

A. To accomplish the purposes of this Easement, Grantee is allowed to prevent any activity on or use of the Property that is inconsistent with the purposes of this Easement and to require the restoration of such areas or features of the Property that may be damaged by such activity or use. Upon any breach of the terms of this Conservation

Easement by Grantor that comes to the attention of the Grantee, the Grantee shall notify the Grantor in writing of such breach. The Grantor shall have 30 days after receipt of such notice to correct the conditions constituting such breach. If the breach remains uncured after 30 days, the Grantee may enforce this Conservation Easement by appropriate legal proceedings including damages, injunctive and other relief. Notwithstanding the foregoing, the Grantee reserves the immediate right, without notice, to obtain a temporary restraining order, injunctive or other appropriate relief if the breach of the term of this Conservation Easement is or would irreversibly or otherwise materially impair the benefits to be derived from this Conservation Easement. The Grantor and Grantee acknowledge that under such circumstances damage to the Grantee would be irreparable and remedies at law will be inadequate. The rights and remedies of the Grantee provided hereunder shall be in addition to, and not in lieu of, all other rights and remedies available to Grantee in connection with this Conservation Easement. The costs of a breach, correction or restoration, including the Grantee's expenses, court costs, and attorneys' fees, shall be paid by Grantor, provided Grantor is determined to be responsible for the breach. The Corps shall have the same right to enforce the terms and conditions of this easement as the Grantee.

B. No failure on the part of the Grantee to enforce any covenant or provision hereof shall discharge or invalidate such covenant or any other covenant, condition, or provision hereof or affect the right to Grantee to enforce the same in the event of a subsequent breach or default.

C. Nothing contained in this Conservation Easement shall be construed to entitle Grantee to bring any action against Grantor for any injury or change in the Property resulting from causes beyond the Grantor's control, including, without limitation, fire, flood, storm, war, acts of God or third parties, except Grantor's lessees or invitees; or from any prudent action taken in good faith by Grantor under emergency conditions to prevent, abate, or mitigate significant injury to life, damage to property or harm to the Property resulting from such causes.

## ARTICLE VI MISCELLANEOUS

A. Warranty. Grantor warrants, covenants and represents that it owns the Property in fee simple, and that Grantor either owns all interests in the Property which may be impaired by the granting of this Conservation Easement or that there are no outstanding mortgages, tax liens, encumbrances, or other interests in the Property which have not been expressly subordinated to this Conservation Easement. Grantor further warrants that Grantee shall have the use of and enjoy all the benefits derived from and arising out of this Conservation Easement, and that Grantor will warrant and defend title to the Property against the claims of all persons.

B. Subsequent Transfers. The Grantor agrees to incorporate the terms of this Conservation Easement in any deed or other legal instrument that transfers any interest in all or a portion of the Property. The Grantor agrees to provide written notice of such transfer at least thirty (30) days prior to the date of the transfer. The Grantor and Grantee agree that the terms of this Conservation Easement shall survive any merger of the fee and easement interests in the Property or any portion thereof and shall not be amended, modified or terminated without the prior written consent and approval of the Corps.

C. Assignment. The parties recognize and agree that the benefits of this Conservation Easement are in gross and assignable provided, however that the Grantee hereby covenants and agrees, that in the event it transfers or assigns this Conservation Easement, the organization receiving the interest will be a qualified holder under N.C. Gen. Stat. § 121-34 et seq. and § 170(h) of the Internal Revenue Code, and the Grantee further covenants and agrees that the terms of the transfer or assignment will be such that the transferee or assignee will be required to continue in perpetuity the conservation purposes described in this document.

D. Entire Agreement and Severability. This instrument sets forth the entire agreement of the parties with respect to the Conservation Easement and supersedes all prior discussions, negotiations, understandings or agreements relating to the Conservation Easement. If any provision is found to be void or unenforceable by a court of competent jurisdiction, the remainder shall continue in full force and effect.

E. Obligations of Ownership. Grantor is responsible for any real estate taxes, assessments, fees, or charges levied upon the Property. Grantor shall keep the Property free of any liens or other encumbrances for obligations incurred by Grantor. Grantee shall not be responsible for any costs or liability of any kind related to the ownership, operation, insurance, upkeep, or maintenance of the Property, except as expressly provided herein. Nothing herein shall relieve the Grantor of the obligation to comply with federal, state or local laws, regulations and permits that may apply to the exercise of the Reserved Rights.

F. Extinguishment. In the event that changed conditions render impossible the continued use of the Property for the conservation purposes, this Conservation Easement may only be extinguished, in whole or in part, by judicial proceeding.

G. Eminent Domain. Whenever all or part of the Property is taken in the exercise of eminent domain so as to substantially abrogate the Restrictions imposed by this Conservation Easement, Grantor and Grantee shall join in appropriate actions at the time of such taking to recover the full value of the taking, and all incidental and direct damages due to the taking.

H. Proceeds. This Conservation Easement constitutes a real property interest immediately vested in Grantee. In the event that all or a portion of this Property is sold, exchanged, or involuntarily converted following an extinguishment or the exercise of eminent domain, Grantee shall be entitled to the fair market value of this Conservation

Easement. The parties stipulate that the fair market value of this Conservation Easement shall be determined by multiplying the fair market value of the Property unencumbered by this Conservation Easement (minus any increase in value after the date of this grant attributable to improvements) by the ratio of the value of this easement at the time of this grant to the value of the Property (without deduction for the value of this Conservation Easement) at the time of this grant. The values at the time of this grant shall be the values used, or which would have been used, to calculate a deduction for federal income tax purposes, pursuant to Section 170(h) of the Internal Revenue Code (whether eligible or ineligible for such a deduction). Grantee shall use its share of the proceeds in a manner consistent with the purposes of this Conservation Easement.

I. Notification. Any notice, request for approval, or other communication required under this Conservation Easement shall be sent by registered or certified mail, postage prepaid, to the following addresses (or such address as may be hereafter specified by notice pursuant to this paragraph):

**To Grantor:**

*[Name, address and fax number]*

**To Grantee:**

*[Name, address and fax number]*

**To the Corps:**

*[Name, address and fax number]*

J. Failure of Grantee. If at any time Grantee is unable or fails to enforce this Conservation Easement, or if Grantee ceases to be a qualified grantee, and if within a reasonable period of time after the occurrence of one of these events Grantee fails to make an assignment pursuant to this Conservation Easement, then the Grantee's interest shall become vested in another qualified grantee in accordance with an appropriate proceeding in a court of competent jurisdiction.

K. Amendment. This Conservation Easement may be amended, but only in a writing signed by all parties hereto, and provided such amendment does not affect the qualification of this Conservation Easement or the status of the Grantee under any applicable laws, and is consistent with the conservation purposes of this grant.

L. *[For use if there is a document describing the current condition of the property. The language provided is applicable if there is a mitigation plan that accurately describes the current condition and uses of the property. If there is not such a plan, another document we agree is accurate and can be identified and is in our files can be referenced.]* Present Condition of the Property. The wetlands, scenic, resource, environmental, and other natural characteristics of the Property, and its current use and state of improvement, are described in Section \_\_\_\_, Appendix B of the Mitigation Plan,

dated \_\_\_\_\_, prepared by Grantor and acknowledged by the Grantor and Grantee to be complete and accurate as of the date hereof. Both Grantor and Grantee have copies of this report. It will be used by the parties to assure that any future changes in the use of the Property will be consistent with the terms of this Conservation Easement. However, this report is not intended to preclude the use of other evidence to establish the present condition of the Property if there is a controversy over its use.

TO HAVE AND TO HOLD the said rights and easements perpetually unto Grantee for the aforesaid purposes.

IN TESTIMONY WHEREOF, the Grantor has hereunto set his hand and seal, the day and year first above written.

*[Signatures of the Grantor and Grantee in appropriate form]*

## ATTACHMENT B- RESTRICTIVE COVENANT GUIDANCE

*August, 2003*

Often, developers of residential or commercial subdivisions subject the property on which the subdivision is built to restrictive covenants, that include provisions such as setbacks, types of homes/buildings that can be built, etc. If the District has determined that restrictive covenants are acceptable as a means of preserving mitigation property, the following language can be added to those restrictive covenants:

“The areas shown on the recorded plat (*identify the plat by title, date, and recording data*) as conservation areas shall be maintained in perpetuity in their natural or mitigated condition. No person or entity shall perform any of the following activities on such conservation area:

- a. fill, grade, excavate or perform any other land disturbing activities
- b. cut, mow, burn, remove, or harm any vegetation
- c. construct or place any roads, trails, walkways, buildings, mobile homes, signs, utility poles or towers, or any other permanent or temporary structures
- d. drain or otherwise disrupt or alter the hydrology or drainage ways of the conservation area
- e. dump or store soil, trash, or other waste
- f. graze or water animals, or use for any agricultural or horticultural purpose

This covenant is intended to ensure continued compliance with the mitigation condition of a Clean Water Act authorization issued by the United States of America, U.S. Army Corps of Engineers, Wilmington District, Action ID , and therefore may be enforced by the United States of America. This covenant is to run with the land, and shall be binding on the Owner, and all parties claiming under it.”

Usually, restrictive covenants have a provision that the property owners (either all of them or some percentage of them) can amend or modify the restrictive covenants. If that is the case, that provision needs to provide that our required paragraph (usually identified by paragraph number) cannot be amended without the express written consent of the U. S. Army Corps of Engineers, Wilmington District.

The permit condition should state that the permittee will record restrictive covenants, acceptable to the Corps of Engineers, for the purpose of maintaining the mitigation areas in their natural state in perpetuity, prior to the sale or conveyance of any lots or other property within the subdivision. It is important that the restrictions be recorded prior to the sale of any property within the subdivision (or phase, if it is being developed by phase). If they are not, then any property sold prior to the recording of the restrictive covenant are not subject to those covenants. Suggest the following:

“Permittee shall execute and cause to be recorded in the \_\_\_\_\_ County Register of Deeds restrictive covenants acceptable to the Corps of Engineers for the purpose of maintaining the conservation areas, as shown on the recorded plat\* (*identify by title, date, and recording data*), in their natural state in perpetuity, prior to the sale or conveyance of any lots or other property within the subdivision. The permittee shall enforce the terms of the restrictive covenants and, prior to conveyance of the property, shall take no action on the property described in the covenants inconsistent with the terms thereof. The permittee shall provide a copy of the recorded restrictive covenants to the Corps of Engineers within 15 days of recording.”

\* It is possible and acceptable that the plat may not be recorded at the time of the issuance of the permit. If that is the case, delete the word “recorded” and be sure you have a copy of a plat showing the conservation areas in the file, and identify it in the permit condition by title and date. The plat, however, must be recorded at the time the restrictive covenants are recorded, and prior to the sale of any lots in the subdivision.

ATTACHMENT C -- MODEL DECLARATION OF RESTRICTIONS

*August, 2003*

**STATE OF NORTH CAROLINA**

\_\_\_\_\_ **COUNTY**

**CONSERVATION DECLARATION**

This **DECLARATION of CONSERVATION COVENANTS, CONDITIONS, and RESTRICTIONS** ("\_\_\_\_\_") is made on this \_\_\_\_\_ day of \_\_\_\_\_, 200\_, by [*NAME AND ADDRESS OF DECLARANT*] "Declarant").

**RECITALS & CONSERVATION PURPOSES**

A. Declarant is the sole owner in fee simple of the certain Conservation Property (Property) being approximately \_\_\_\_\_ acres, more particularly described in Exhibit A attached hereto and by this reference incorporated herein [*reference to a recorded map showing a survey of the preserved area may be required*]; and

B. The purpose of this Conservation Declaration is to maintain wetland and/or riparian resources and other natural values of the Property, and prevent the use or development of the Property for any purpose or in any manner that would conflict with the maintenance of the Property in its natural condition. The preservation of the Property in its natural condition is a condition of Department of the Army permit Action ID \_\_\_\_\_ issued by the Wilmington District Corps of Engineers (Corps), required to mitigate for unavoidable impacts to waters of the United States authorized by that permit, and this Conservation Declaration may therefore be enforced by the United States of America.

NOW, THEREFORE the Declarant hereby unconditionally and irrevocably declares that the Property shall be held and subject to the following restrictions, covenants and conditions as set out herein, to run with the subject real property and be binding on all parties that have or shall have any right, title, or interest in said property.

**ARTICLE I. PROHIBITED AND RESTRICTED ACTIVITIES**

Any activity on, or use of, the Property inconsistent with the purposes of this Conservation Declaration is prohibited. The Property shall be maintained in its natural, scenic, and open condition and restricted from any development or use that would impair

or interfere with the conservation purposes of this Conservation Declaration set forth above.

Without limiting the generality of the foregoing, the following activities and uses are expressly prohibited or restricted.

A. Disturbance of Natural Features. Any change disturbance, alteration or impairment of the natural features of the Property or any introduction of non-native plants and/or animal species is prohibited.

B. Construction. There shall be no constructing or placing of any building, mobile home, asphalt or concrete pavement, billboard or other advertising display, antenna, utility pole, tower, conduit, line, pier, landing, dock or any other temporary or permanent structure or facility on or above the Property.

C. Industrial, Commercial and Residential Use. Industrial, residential and/or commercial activities, including any right of passage for such purposes are prohibited.

D. Agricultural, Grazing and Horticultural Use. Agricultural, grazing, animal husbandry, and horticultural use of the Property are prohibited.

E. Vegetation. There shall be no removal, burning, destruction, harming, cutting or mowing of trees, shrubs, or other vegetation on the Property.

F. Roads and Trails. There shall be no construction of roads, trails or walkways on the property.

G. Signage. No signs shall be permitted on or over the Property, except the posting of no trespassing signs, signs identifying the conservation values of the Property, signs giving directions or proscribing rules and regulations for the use of the Property and/or signs identifying the Grantor as owner of the property.

H. Dumping or Storage. Dumping or storage of soil, trash, ashes, garbage, waste, abandoned vehicles, appliances, machinery or hazardous substances, or toxic or hazardous waste, or any placement of underground or aboveground storage tanks or other materials on the Property is prohibited.

I. Excavation, Dredging or Mineral Use. There shall be no grading, filling, excavation, dredging, mining or drilling; no removal of topsoil, sand, gravel, rock, peat, minerals or other materials, and no change in the topography of the land in any manner on the Property, except to restore natural topography or drainage patterns.

J. Water Quality and Drainage Pattern. There shall be no diking, draining, dredging, channeling, filling, leveling, pumping, impounding or related activities, or altering or tampering with water control structures or devices, or disruption or alteration of the restored, enhanced, or created drainage patterns. In addition, diverting or causing

or permitting the diversion of surface or underground water into, within or out of the easement area by any means, removal of wetlands, polluting or discharging into waters, springs, seeps, or wetlands, or use of pesticide or biocides is prohibited.

K. Development Rights. No development rights that have been encumbered or extinguished by this Conservation Declaration shall be transferred pursuant to a transferable development rights scheme or cluster development arrangement or otherwise.

L. Vehicles. The operation of mechanized vehicles, including, but not limited to, motorcycles, dirt bikes, all-terrain vehicles, cars and trucks is prohibited.

M. Other Prohibitions. Any other use of, or activity on, the Property which is or may become inconsistent with the purposes of this grant, the preservation of the Property substantially in its natural condition, or the protection of its environmental systems, is prohibited.

## **ARTICLE II. ENFORCEMENT & REMEDIES**

A. This Declaration is intended to ensure continued compliance with the mitigation condition of authorizations issued by the United States of America, U.S. Army Corps of Engineers, Wilmington District, and therefore may be enforced by the United States of America. This covenant is to run with the land and shall be binding on all parties and all persons claiming under the Declarant.

B. Corps, its employees and agents and its successors and assigns, have the right, with reasonable notice, to enter the Property at reasonable times for the purpose of inspecting the Property to determine whether the Declarant, Declarant's representatives, or assigns are complying with the terms, conditions and restrictions of this Conservation Declaration.

C. Nothing contained in this Conservation Declaration shall be construed to entitle Corps to bring any action against Declarant for any injury or change in the Conservation Property caused by third parties, resulting from causes beyond the Declarant's control, including, without limitation, fire, flood, storm, and earth movement, or from any prudent action taken in good faith by the Declarant under emergency conditions to prevent, abate, or mitigate significant injury to life, damage to Property or harm to the Property resulting from such causes.

## **ARTICLE III. PUBLIC ACCESS**

A. This Conservation Declaration does not convey to the public the right to enter the Property for any purpose whatsoever.

**ARTICLE IV. DOCUMENTATION AND TITLE**

A. Conservation Property Condition. The Declarant represents and acknowledges that the Property is currently undeveloped land, with no improvements other than any existing utility lines, Declarations and rights of way.

B. Title. The Declarant covenants and represents that the Declarant is the sole owner and is seized of the Property in fee simple and has good right to make the herein Declaration; that there is legal access to the Property, that the Property is free and clear of any and all encumbrances, except Declarations of record.

**ARTICLE V. MISCELLANEOUS**

A. Conservation Purpose.

(1) Declarant, for itself, its successors and assigns, agrees that this Conservation Property shall be held exclusively for conservation purposes.

B. Entire Agreement. This instrument sets forth the entire agreement of the parties with respect to the Conservation Declaration and supersedes all prior discussions, negotiations, understandings or agreements relating to the Conservation Declaration. If any provision is found to be invalid, the remainder of the provisions of this Conservation Declaration, and the application of such provision to persons or circumstances other than those as to which it is found to be invalid, shall not be affected thereby.

C. Recording. Declarant shall record this instrument and any amendment hereto in timely fashion in the official records of \_\_\_\_\_ County, North Carolina, and may re-record it at any time as may be required to preserve its rights.

D. Environmental Condition of Conservation Property. The Declarant warrants and represents that to the best of its knowledge after appropriate inquiry and investigation: (a) the Property described herein is and at all times hereafter will continue to be in full compliance with all federal, state and local environmental laws and regulations, and (b) as of the date hereof there are no hazardous materials, substances, wastes, or environmentally regulated substances (including, without limitation, any materials containing asbestos) located on, in or under the Property or used in connection therewith, and that there is no environmental condition existing on the Property that may prohibit or impede use of the Property for the purposes set forth in the Recitals.

**IN WITNESS WHEREOF**, Declarant has hereunto set his hand and seal, the day and year first above written.

*[Signature of Declarant in proper form]*