



# Site Protection of Compensatory Mitigation Projects

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## **Basic Requirement for Site Protection**

All compensatory mitigation plans required for Department of the Army (DA) permits must address 12 fundamental components. One of these components is the “site protection instrument” (see 33 CFR 332.4(c)). Long-term protection required for compensatory mitigation sites must be provided through real estate instruments or other appropriate mechanisms, as appropriate, considering relevant legal constraints.

## **What is a site protection instrument?**

The site protection instrument is a written description of the legal arrangements, including site ownership, management, and enforcement of any use restrictions (such as prohibitions on mining, dumping, or clearing), that will be used to ensure the long-term protection of the compensatory mitigation project site. A real estate instrument should be legally sufficient, enforceable, properly recorded in the chain of title, and be able to ensure long-term protection of the compensatory mitigation site. A national standardized real estate instrument is not possible since real property laws differ from state to state. Because the protection of a compensatory mitigation site requires involvement of the owner of the property or an entity with a pertinent property interest, it is preferable that the owner of the compensatory mitigation site (or an entity with a property interest in the mitigation site) be a permittee of a DA permit and/or sponsor of the mitigation bank or in-lieu fee program. The U.S. Army Corps of Engineers (USACE) Office of Counsel plays an essential role in providing advice and determining the legal sufficiency of real estate site instruments and other site protection instruments for compensatory mitigation sites. For compensatory mitigation projects on government lands, alternative approaches to site protection may be needed if the government agency cannot execute real estate instruments on government property. Examples of alternate approaches include natural resource management plans or a documented commitment from the agency responsible for managing the land.



## **What must be given long-term protection?**

The entire mitigation project including aquatic habitats, riparian buffers, and uplands must be provided long-term protection through real estate instruments or other available mechanisms as appropriate.

## **What is USACE’s role in site protection?**

- USACE is responsible for reviewing the site protection instrument to ensure that it is legally sufficient and appropriate and provides sufficient long-term protection of the mitigation project site.
- USACE is not legally authorized to sign a real estate instrument such as a conservation easement or deed restriction and cannot be the easement holder.
- USACE may however be granted rights to enforce the site protection instrument in the event that the landowner or easement holder does not do so.
- USACE must be notified at least 60 days before a site protection instrument is amended or terminated.

## **What are the most common site protection instruments used to provide long-term protection of compensatory mitigation projects?**

- Conservation Easements
- Deed Restrictions (Restrictive Covenants)
- Transfer of Title

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- Other Documents, such as Conservation Land Use Agreements, Federal Facility Management Plans or Integrated Natural Resources Management Plans, that protect real property or mitigation projects on federal, state, or local government lands
- Not all forms of site protection may be available for a given compensatory mitigation site.



### What are some key points of these site protection instruments?

**Conservation easement** – A binding agreement between the landowner and another party (non-USACE government agency or non-profit) called an easement holder that permanently limits uses of the land to protect natural resources. The easement holder agrees to monitor the land and take action to prevent or halt incompatible activities on the property. This is the most secure form of site protection instrument and runs with the land.

**Deed Restrictions** – also called Declarations of Restriction or restrictive covenants. The landowner voluntarily agrees to restrict its activities on the property in return for some benefit such as receiving a permit. There is no easement holder to monitor the condition of the property. The responsibility for enforcement is the landowner's and USACE, if it has right of enforcement. The right of enforcement may also be assigned to a local or state agency or another federal agency such as the U.S. Fish and Wildlife Service.

**Title Transfer** – is the transfer of ownership to a conservation entity federal, state, local, or tribal government or non-profit organization to manage and protect the compensatory mitigation site.

**Conservation Land Use Agreements and Federal facility Management Plans** – are used most commonly on federal lands where an encumbrance cannot legally be recorded on the deed. In a conservation land-use agreement the landowner (government agency) agrees to protect the land and to manage it for compensatory mitigation purposes. A federal facility management plan (e.g., a forest management plan or Integrated Natural Resources Management Plan) identifies lands that are to be conserved and suitable uses of those lands. The plan is periodically reviewed and may be revised.

### What elements are common to most site protection instruments?

- The purpose of the instrument, such as conserving aquatic habitats, protecting wildlife habitat, maintaining water quality, etc.
- Baseline conditions (at the time the instrument goes into effect) to allow identification of encroachments or incompatible activities
- Incompatible or prohibited activities
- Allowable activities
- Enforcement of the instrument and associated restorations
- Amendment, extinguishment, and transfer to others

### What is the timing of long-term protection?

USACE must approve the mechanism or instrument in advance of or concurrent with the permitted activity. Long-term protection must be in place before any credits are available from a mitigation bank or In-Lieu Fee project site.

USACE Institute for Water Resources (IWR) with the authorization and support of USACE Headquarters developed a guide to site protection for compensatory mitigation, the "**Compensatory Mitigation Site Protection Instrument Handbook**". This handbook describes and compares key features of different site protection instruments and can be downloaded from the IWR website at:

[http://www.iwr.usace.army.mil/Portals/70/docs/iwrreports/Site\\_Protection\\_Instrument\\_Handbook\\_August\\_2016.pdf?ver=2016-08-29-082816-237](http://www.iwr.usace.army.mil/Portals/70/docs/iwrreports/Site_Protection_Instrument_Handbook_August_2016.pdf?ver=2016-08-29-082816-237)