INTRODUCTION

This template declaration of restrictive covenants for conservation (Restrictive Covenant) was developed by the US Army Corps of Engineers (Corps) and the Kentucky Energy and Environment Cabinet, Department of Environmental Protection, Division of Water (Cabinet). The terms and conditions contained within this Restrictive Covenant provide the baseline terms and conditions for acceptance by the Corps and Cabinet when used in conjunction with an application for Department of the Army (DA) authorization pursuant to Section 10 of the Rivers and Harbors Act (33 U.S.C. § 403) and/or Section 404 of the Clean Water Act (33 U.S.C. § 1344) and for a Water Quality Certification (Certification) issued by the Cabinet, in accordance with Section 401 of the Clean Water Act (33 U.S.C. § 1341) and Section 224.16-050 of the Kentucky Revised Statutes.

INSTRUCTIONS

Throughout the Restrictive Covenant, inline instruction and optional language is bracketed and stated in grey font. Follow the instruction and, if applicable, select appropriate optional language to include in the Restrictive Covenant.

Once this Restrictive Covenant is filled out, it must be submitted with necessary exhibits as a draft for the Corps and Cabinet to review and approve as part of the authorization process.

Once approved by the Corps and Cabinet, the Restrictive Covenant must be recorded in all applicable county offices. A copy of the recorded Restrictive Covenant must be sent by mail and received by the appropriate Corps District office and Cabinet within thirty (30) calendar days of recording and before mitigation work may commence.

DISCLAIMER

This template may or may not serve the needs of an applicant and it does not constitute legal, accounting, or tax advice. Executed Restrictive Covenants must be recorded and will be enforced. Any person considering using this Restrictive Covenant is encouraged to obtain the services of an attorney licensed to practice law in the Commonwealth of Kentucky.

POINT OF CONTACT

The following points of contact are available for additional information about this Restrictive Covenant:

**Corps**

(502) 315-6692

CELRL.Door.To.The.Corps@usace.army.mil

**Cabinet**

(502) 564-3410

401WQC@KY.gov

DECLARATION OF RESTRICTIVE COVENANTS FOR CONSERVATION

**THIS DECLARATION OF RESTRICTIVE COVENANTS FOR CONSERVATION** is made this [enter day] day of [enter month], [enter year], by [enter Declarant names and address](“Declarant”) and by [enter Sponsor name and address] (“Sponsor”).

**RECITALS**

WHEREAS, Declarant is the sole owner in fee simple of real property located in [enter county name] County, Kentucky, as described in Deed Book [enter deed book number], Page [enter page number], [if multiple properties are required to accommodate access, include additional language for each property] in [enter county office name], [if the Access Property spans multiple Counties, include the prior information for each property by county] and as more particularly described in the legal description[(s)] attached hereto in Exhibit A and shown on the [reference a platted survey, approved drawing, and/or site plan] attached hereto as Exhibit B, both of which are incorporated herein by reference (“Access Property”);

WHEREAS, Declarant is the sole owner in fee simple of the real property depicted on the [enter reference to a platted survey, approved drawing, and/or site plan] attached hereto as Exhibit C and incorporated herein by reference (“Mitigation Property”),

WHEREAS, Sections 401 and 404 of the Clean Water Act require compensatory mitigation when impacts from the discharge of dredged and/or fill material into jurisdictional waters of the United States are unavoidable;

WHEREAS, Sponsor is a [enter business type and state of incorporation or formation] that has agreed to perform compensatory mitigation on behalf of Declarant.

WHEREAS, Declarant and Sponsor have agreed to implement a mitigation plan dated [enter date] (“Mitigation Plan”) and Declarant has agreed to place certain restrictive covenants on the Mitigation Property as compensatory mitigation under Federal and State law for and in consideration of [enter “Department of the Army Permit No. LRL-0000-00000” or “Verification Letter No. LRL-0000-00000” or other authorization No.] (“Authorization”) issued by the U.S. Army Corps of Engineers, [enter name of District office] District (“Corps”) pursuant to Section 404 of the Clean Water Act (33 U.S.C. § 1344) and/or Section 10 of the Rivers and Harbors Act (33 U.S.C. § 403), and Water Quality Certification No. [add Water Quality Certification number associated with authorization (i.e. 00-00-0)] (“Certification”) issued by the Kentucky Energy and Environment Cabinet, Department of Environmental Protection, Division of Water (“Cabinet”), in accordance with Section 401 of the Clean Water Act (33 U.S.C. § 1341) and Section 224.16- 050 of the Kentucky Revised Statutes and in recognition of the continuing benefit created by the Mitigation Property, and for the protection of waters of the United States and scenic, resource, environmental, and other conservation values; and

WHEREAS, Declarant has agreed to grant a right of access and entry to the Access Property;

NOW THEREFORE, in consideration of the benefits to be derived and as required compensatory mitigation by the Authorization and Certification, Declarant for itself and on behalf of its successors, heirs, assigns, executors, administrators, legal representatives, lessees and transferees, including, without limitation, any owners, occupiers, and/or users firms, associations, corporations and/or governmental entities having or hereafter acquiring any right, title, or interest in the Access Property and/or Mitigation Property or any part thereof (“Successors”) hereby makes this Declaration:

**1. Purpose.** The purpose of this Declaration is to restrict the current and future use of the Mitigation Property in perpetuity in order to protect aquatic resource functions and values, scenic, resource, environmental, and other conservation values, and conservation functions and ecological services and to grant a right of access and entry to the Access Property and Mitigation Property.

**2. Covenants Running with the Land.** Declarant hereby declares that the Access Property and Mitigation Property shall be bound by, held, transferred, sold, conveyed, leased, improved, hypothecated, occupied or otherwise disposed of and used subject to all the restrictive covenants, rights of access and entry provisions, property transfer provisions, and all other provisions set out in this Declaration and any amendments thereto, which shall be perpetual and run with the land and be binding Declarant and Successors. The terms and conditions of this Declaration shall be both explicitly and implicitly included in any subsequent transfer, conveyance, or encumbrance affecting all or part of the Access Property and/or Mitigation Property. Any such transfer, conveyance or encumbrance shall set forth the terms and conditions of this Declaration by reference to this document and its recorded location in accordance with section 9.

**3. Restrictions/Prohibitions.** Any activity on, or use of, the Mitigation Property, which is or may become inconsistent with the purposes of this Declaration is prohibited. Without limiting the generality of the foregoing, the following activities are expressly prohibited except in accordance with the Mitigation Plan or as provided for in the Reserved Rights:

 **3.1** General/Topography. There shall be no filling, flooding, cultivating, excavating, earthmoving, grading, quarrying, mining, or drilling; no removal of natural materials; no dumping of materials; and no alteration of topography in any manner.

 **3.2** Waters and Wetlands. There shall be no draining, ditching, diking, dredging, channelizing, damming, pumping, or impounding; changing the grade, elevation or cross-sectional topography; impairing or diverting the flow or circulation of waters; altering the duration, frequency, volume, velocity, or discharge of flow; or reducing the reach without the prior approval by the Corps and Cabinet.

 **3.3** Trees/Vegetation. There shall be no clearing, burning, cutting, mowing, or destroying of trees shrubs, herbaceous, or other vegetation without prior approval by the Corps and Cabinet.

 **3.4** Non-Native/Exotic Species. There shall be no introduction of non-native or exotic species.

 **3.5** Uses. There shall be no agricultural, silviculture, commercial, or industrial activity undertaken or allowed, including but not limited to grazing and mining. There shall be no use of horseback riding, off road vehicles, 4-wheel drive vehicles, all-terrain vehicles, snowmobiles, or other types of motorized or non-motorized vehicles except on existing roads.

 **3.6** Structures. There shall be no construction, erection, or placement of buildings, billboards, signs, or any other temporary or permanent structure, nor any additions to existing structures. [If there are existing structures, include the following sentence: The foregoing shall not preclude repairs or maintenance of existing [identify structure(s)] depicted in Exhibit [Enter exhibit letter]. For purposes of this section, maintenance shall mean the repair, rehabilitation, or replacement of a previously identified, authorized, and currently serviceable structure provided that the structure is not put to any use differing from the use previously identified, authorized, and currently serviceable.]

 **3.7** Roads. There shall be no construction or building of new roads, trails, paths, or other rights of way without prior approval by the Corps and Cabinet. There shall be no expansion, modification, realignment, or improvement of existing roads, trails, paths, or other rights of way that alters the footprint of said existing roads, trails, paths, or other rights of way without prior approval by the Corps and Cabinet.

 **3.8** Utilities. There shall be no construction or placement of utilities or related facilities without prior approval of the Corps and Cabinet. [if there are existing utilities, include the following sentence: For existing utilities [identify utilities] depicted in **Exhibit** [enter exhibit letter],repairs and maintenance may occur after providing sixty (60) calendar day prior notice to the Corps and Cabinet of the activity and any necessary rehabilitation work**.**]

 **3.9** Waste. There shall be no placement of refuse, wastes, sewage, dredged spoil, solid waste, incinerator residue, garbage, sewage sludge, munitions, chemical waste, biological materials, radioactive materials, heat, wrecked or discarded equipment, rock, salt, sand, cellar dirt, or industrial, municipal, or agricultural waste, or any other pollutant.

 **3.10** Pest Control. There shall be no application of pesticides or biological controls, including but not limited to insecticides, fungicides, rodenticides and herbicides, without prior approval from the Corps and Cabinet.

 **3.11** Oil, Gas, Mineral, and Timber Interests. There shall be no severance of any rights or interests in the Mitigation Property, whether by conveyance, grant, lease, encumbrance, adverse possession, or other method of severance, including but not limited to coal, mineral, oil, gas, quarry, mining, and timber rights or interests. Any purported severance of rights or interests in the Mitigation Property or the Access Property shall be null and void and have no effect.

**4. Reserved Rights.** Notwithstanding the foregoing Restrictions/Prohibitions, Declarant, Successors, and Sponsor reserve the right to engage in all other activities on, or use of, the Mitigation Property consistent with the Mitigation Plan and this Declaration, provided that written notice is given to the Corps and the Cabinet at least sixty (60) calendar days prior to engaging in such activities or uses.

 **4.1** Wildlife and Forestry Management. Declarant, Successors, and Sponsor may naturally manage, preserve, and improve wildlife resources. Declarant, Successors, and Sponsor may remove or trim vegetation hazardous to persons or property, including the removal of invasive or non-native species, and harvest and manage timber downed or damaged due to natural forces, such as fire, storms, insects, or infectious organisms, to the extent necessary to protect the environment. Such activities shall be carried out only after approval by the Corps and Cabinet.

 **4.2** Landscape Management. Declarant, Successors, and Sponsor may undertake landscaping necessary to prevent severe erosion or damage, or significant detriment to reserved rights, to the extent such landscaping is consistent with the Mitigation Plan. Such management activities shall be carried out only after approval by the Corps and Cabinet.

 **4.3** Recreation. Declarant and Successors reserve the right to engage in outdoor, non-commercial recreational activities, including hunting, fishing, and similar recreational or educational activities, excluding planting and burning. Such activities are only authorized to the extent that, singularly or cumulatively, they have no more than a nominal negative impact. No prior notice to the Corps and Cabinet is required.

 **4.4** Road Maintenance. Declarant, Successors, and Sponsor reserve the right to maintain existing roads, trails, or other rights of way, provided said activities are performed pursuant to the terms of an existing permanent easement. Maintenance shall be limited to: removal or pruning of dead or hazardous vegetation; application of permeable materials (e.g., sand, gravel) necessary to correct or impede erosion; grading; replacement of culverts, water control structures, or bridges; and maintenance of roadside ditches.

 **4.5** Signs. Declarant, Successors, and Sponsor reserve the right to post signs that convey information about the Mitigation Property, including “no trespassing” signs, “no mowing” signs, temporary signs indicating the Mitigation Property is for sale, educational signs identifying the trees, vegetation, wetlands or conservation ecological services of the Mitigation Property, and signs identifying the owner.

 **4.6** Mitigation Measures. Declarant and Sponsor reserve the right to undertake restoration and mitigation measures required under the Mitigation Plan or otherwise required under law.

**5. Signage.** Declarant, Successors, and/or Sponsor shall erect and maintain in legible condition any signs required by the Mitigation Plan.

**6. Rights of Access and Entry.** The Corps, Cabinet, and their authorized agents are granted an irrevocable and assignable right to enter in, on, over and across the Access Property and Mitigation Property to inspect and monitor the Mitigation Property; to implement the Mitigation Plan or take corrective measures under the Mitigation Property; to take any actions necessary to maintain or restore the Mitigation Property in accordance with the Mitigation Plan; or to take any actions necessary to verify compliance with this Declaration. No rights of access or entry to or use of any portion of the Mitigation Property or Access Property is granted or conveyed to members of the general public by this Declaration.

**7. Enforcement.** As third party beneficiaries, the Corps and the Cabinet have a discretionary right to enforce this Declaration in a judicial action against any person or other entity violating or attempting to violate this Declaration; provided, however, that no violation of this Declaration shall result in forfeiture or reversion of title. In any enforcement action for violations of this Declaration, the Corps and the Cabinet shall be entitled to complete restoration of the Mitigation Property for any violation, as well as any other remedy available under law or equity, such as injunctive relief and administrative, civil or criminal penalties. No omission or delay in acting by the Corps and/or Cabinet shall bar subsequent enforcement rights or constitute a waiver of any enforcement right. These enforcement rights are in addition to, and shall not limit, enforcement rights available under other provisions of law or equity, or under any applicable authorization or certification. Nothing herein shall limit the right of the Corps to modify, suspend, or revoke the Authorization. Nothing herein shall limit the right of the Cabinet to modify, suspend, or revoke the Certification. Nothing herein shall be construed to authorize the Corps or Cabinet to institute proceedings against Declarant, Successors, and/or Sponsor for changes to the Mitigation Property due to acts of God or natural disasters outside the control of Declarant, Successors, and/or Sponsor, so long as the compensatory mitigation is completed and determined by the Corps and Cabinet to be successful in accordance with the Mitigation Plan. Nothing herein shall be construed to authorize the Corps or Cabinet to institute proceedings against Declarant, Successors, and/or Sponsor for unauthorized acts of third parties outside the control of Declarant, Successors, and/or Sponsor, so long as the compensatory mitigation is completed and determined by the Corps and Cabinet to be successful in accordance with the Mitigation Plan and Declarant, Successors, and/or Sponsor seek restoration from the third party.

**8. Notice to the Government.** Declarant, Successors, and/or Sponsor must provide sixty (60) calendar day prior notice to the Corps and Cabinet before any of the following actions, or immediately upon becoming aware that any of the following actions have already been taken:

 **8.1** Submission of any application, or request for certification or modification made to any governmental entity that may affect the Access Property and/or Mitigation Property. Any such submission must expressly reference and include a copy (with the recording stamp) of this Declaration.

 **8.2** Any legal action affecting the Access Property, Mitigation Property, or this Declaration, including but not limited to foreclosure proceedings, tax sales, bankruptcy proceedings, zoning changes, adverse possession, abandonment, condemnation proceedings, and the exercise of the power of eminent domain.

 **8.3** Any action that might result in any provision of this Declaration being voided or modified.

 **8.4** Any grant, transfer, or conveyance of any interest in any or all of the Access Property or Mitigation Property. The notice shall include the name, address, and telephone number of the prospective transferee, a copy of the proposed deed or other documentation evidencing the conveyance, and a survey map that shows the boundaries of the portion of the Access Property and/or Mitigation Property being transferred.

**9. Property Transfers.** Declarant and Successors shall include the following notice on all deeds, mortgages, plats, or any other legal instrument used to convey any interest in the Access Property and/or Mitigation Property:

NOTICE: This Property is subject to a Declaration of Restrictive Covenants for Conservation dated \_, recorded in the [enter County Office name] on in Deed Book , Page and enforceable by the U.S. Army Corps of Engineers (DA Permit no. [Fill in Permit no.]) and Kentucky Energy and Environment Cabinet, Department of Environmental Protection, Division of Water (Agency Interest no. [Fill in AI]).

Failure to comply with this section does not impair the validity or enforceability of this Declaration.

**10. Declarants’ Warranties.** Declarant represents and warrants that:

[Select one of the following paragraphs for subsection 10.1. Select the first paragraph if there are no encumbrances. Select the second paragraph if the only encumbrances are utility easements. Select the third paragraph if there are interests other than utility easements that will be subordinated.]

 **10.1** Declarant is the sole owner of the Access Property and Mitigation Property and holds fee simple title which is free and clear of any and all liens, loans, claims, restrictions, easements and encumbrances;

 **10.1** Declarant is the sole owner of the Access Property and Mitigation Property and holds fee simple title which is free and clear of any and all liens, loans, claims, restrictions, easements and encumbrances, except as otherwise identified in Exhibit [enter exhibit letter] hereto;

 **10.1** To the extent that other interests in the Access Property and Mitigation Property exist, the holders of such interests have agreed to subordinate their interests in the Access Property and Mitigation Property to this Declaration, pursuant to the subordination agreement(s) attached hereto as Exhibit [enter exhibit letter];

[End of subsection 10.1 selection.]

 **10.2** Declarant is the sole owner of all oil, gas, mineral, quarry, mining, and timber interests associated with the surface estate of the Access Property and Mitigation Property;

 **10.3** Declarant has identified all other parties that hold any interest (e.g. encumbrances) in the Access Property and/or Mitigation Property and has notified such parties of Declarant’s intent to grant this Declaration, and each interest party has signed a Subordination Agreement (attached hereto and incorporated herein as Exhibit(s) [Enter Exhibit Letters];

 **10.4** There are no conflicting property interests or rights, including, but not limited to, oil, gas, mineral, quarry, mining, or timber interests held by third parties;

 **10.5** This Declaration will not materially violate or contravene or constitute a material default under any other agreement, document, or instrument to which Declarant is a party, or by which Declarant may be bound or affected;

 **10.6** This Declaration will not materially violate or contravene any zoning law or other law regulating use of the Access Property and/or Mitigation Property;

 **10.7** This Declaration does not authorize a use of the Access Property and/or Mitigation Property that is otherwise prohibited by a recorded instrument that has priority over the Declaration;

 **10.8** No substance defined, listed, or otherwise classified pursuant to any federal, state, or local law, or regulation, as hazardous, toxic, polluting, or otherwise contaminating to the water or soil, has been released, generated, treated, stored, used, disposed of, deposited, abandoned, or transported in, on, from, or across the Mitigation Property;

 **10.9** There are no underground storage tanks located on the Mitigation Property whether presently in service or closed, abandoned, or decommissioned; and

 **10.10** The Mitigation Property is in compliance with all federal, state, and local laws, regulations, authorizations, and permits and there is no pending or threatening litigation in any way affecting, involving, or relating to the Mitigation Property and its use.

**11. Sponsor’s Warranties.** The Sponsor represents and warrants that:

 **11.1** The Sponsor is a [business entity type and state of incorporation or formation] legally authorized and fully able to take all actions necessary to implement the Mitigation Plan;

 **11.2** The Sponsor accepts responsibility for implementing the Mitigation Plan and warrants that its signature to this Declaration represents its agreement to be bound by all terms and conditions established by this Declaration and the Mitigation Plan in performance of its responsibilities;

 **11.3** This Declaration will not materially violate or contravene or constitute a material default under any other agreement, document, or instrument to which the Sponsor is a party, or by which the Sponsor may be bound or affected; and

 **11.4** The Mitigation Property is in compliance with all federal, state, and local laws, regulations, authorizations, and permits and there is no pending or threatening litigation in any way affective, involving, or relating to the Mitigation Property and its use.

**12. Notification.** Any notice, request for approval, approval, or other communication required by this Declaration shall be made in writing and deemed to have been duly sent and received on the third business day after the date on which it is so mailed if it is sent by certified or registered mail with postage prepaid to the following addresses (or such addresses as may be hereinafter specified by notice pursuant to this section):

To Declarant: [enter addresses for Declarants]

To Sponsor: [Enter address for Sponsor]

To Corps:

[Enter one of the following addresses for the District Office responsible for the authorization.]

[Louisville District – South Section]

U.S. Army Corps of Engineers

CELRL-RD, Room 183

P.O. Box 59

Louisville, KY 40201-0059

[Louisville District – West Section]

U.S. Army Corps of Engineers

Newburgh Regulatory Office

6855 State Road 66

Newburgh, IN 47630-9794

[Memphis District]

U.S. Army Corps of Engineers, Memphis District

ATTN: Regulatory Office

167 N. Main Street, Room B-202

Memphis, TN 38103-1894

[Nashville District]

US Army Corps of Engineers

Regulatory Branch

3701 Bell Road

Nashville, TN 37214

To Cabinet:

300 Sowers Boulevard, Third Floor

Frankfort, KY 40601

Attn: Water Quality Certification Section Supervisor

**13. Amendment.** After recording, this Declaration may only be amended by a recorded document signed by the Corps, Cabinet, and Declarant/Successors. Amendment shall be allowed at the discretion of the Corps and Cabinet, in consultation with resource agencies as appropriate, and then only in exceptional circumstances. Any amendment must be consistent with the requirements of Sections 401 and 404 of the Clean Water Act. There shall be no obligation to allow an amendment.

**14. Termination.** This Declaration is intended to be perpetual in nature and run with the land as set forth in section 1 and 2 of this Declaration. However, if the Corps and Cabinet determine that the compensatory mitigation undertaken on the Mitigation Property set forth in the Mitigation Plan is not successful and the approved alternative mitigation does not involve the Mitigation Property, then Declarant/Successors, Corps, and Cabinet may terminate this Declaration by a recorded document signed by the Corps, Cabinet, and Declarant.

**15. Recording.** Declarant shall record this Declaration in the official property records of the Office of the [enter County Office name] within thirty (30) calendar days of execution of this Declaration by Declarant and Sponsor, and shall, within thirty (30) calendar days of recording, provide the Corps and the Cabinet with a copy of the recorded Declaration and exhibits. Declarant may re-record this instrument at any time as may be required to preserve its rights.

**16. Successor in Interest.** All references to the Corps and the Cabinet shall include successor governmental agencies, departments, or divisions, or any other successor entities prescribed by law.

**17. Severability Provision.** Should any part, provision, representation, or warranty of this Declaration be held contrary to law, unenforceable, or void, the remainder of this Declaration shall be unaffected thereby and shall continue to be valid and enforceable.

IN WITNESS WHEREOF, Declarant and Sponsor have duly executed this Declaration effective on the date first written above, but actually on the date set forth below.

DECLARANT

By:

 [enter name of signatory]

[enter signatory title if Declaration being made by incorporated entity]

Date

COMMONWEALTH OF KENTUCKY

COUNTY OF [enter county name]

Subscribed and sworn to before me by this the day of , .

NOTARY PUBLIC

My Commission Expires:

SPONSOR

By:

 [enter name of signatory]

[enter signatory title if Declaration being made by incorporated entity]

Date

COMMONWEALTH OF KENTUCKY

COUNTY OF [enter county name]

Subscribed and sworn to before me by this the day of , .

NOTARY PUBLIC

My Commission Expires:

Instrument Prepared By:

[Name of preparer]

[Address of preparer]