

**DECLARATION OF  
RESTRICTIVE COVENANTS**

**THIS DECLARATION OF RESTRICTIVE COVENANTS** made this \_\_\_\_ day of \_\_\_\_\_, 200\_, by \_\_\_\_\_ (“Declarant”).

**RECITALS**

WHEREAS, Declarant is the owner of the surface of certain real property located in \_\_\_\_\_ County, West Virginia, the approximate boundary of which is more particularly depicted in Exhibit "A" attached hereto and by this reference incorporated herein as the "Property," and desires to sanction the creation, enhancement, and/or restoration of a sufficient habitat thereon to provide for the aquatic environment; and

WHEREAS, road construction activities, conducted by another entity on the same and/or other real properties owned by Declarant, require compensatory mitigation to obtain §404 authorization from the Department of Army, Corps of Engineers ("Corps"); and

WHEREAS, in consideration of the issuance of a §404 authorization (the "Permit") by the Corps (to include any successor agency) and certification and/or permits by the West Virginia Department of Environmental Protection (WVDEP, to include any successor agency) and for the protection of the created, enhanced, and/or restored aquatic habitat and other values, Declarant has agreed to place certain restrictive covenants on the Property, each and all of which is and are for the benefit of the Property.

NOW THEREFORE, Declarant hereby declares that the Property shall be held, transferred, conveyed, leased, occupied or otherwise disposed of and used subject to the following restrictive covenants, which shall run with the land and be binding on all heirs, successors, assigns, lessees, or other occupiers and users ("Others") of the Property.

**ARTICLE 1**

**PROPERTY SUBJECT TO THIS DECLARATION**

1.1. The real property which is and which shall be held, transferred, conveyed, leased, occupied or otherwise disposed of, and used subject to this Declaration is located in \_\_\_\_\_ County, West Virginia, the approximate boundary of which is more particularly depicted in Exhibit "A."

## ARTICLE 2

### USE RESTRICTIONS AND RESPONSIBILITIES

2.1. Declarant is and shall be prohibited, unless the required permits or management plans from the appropriate agencies are obtained, from the following: filling, draining, flooding, dredging, impounding, clearing, burning, cutting or destroying vegetation, cultivating, excavating, erecting, constructing, or otherwise doing any work on the Property; introducing exotic species into the Property; and from substantially changing the grade or elevation, impairing the flow or circulation of waters, reducing the reach of waters, and any other discharge or activity requiring a permit under clean water or water pollution laws and regulations, as amended. The following are expressly excepted from this paragraph: (a) cumulatively very small impacts associated with hunting (excluding planting or burning), fishing, and similar recreational activities, consistent with the created, enhanced, and/or restored condition of the Property, (b) ingress and egress needed for logging activities with such activities resulting in only reasonably necessary disturbance of the property, (c) ingress and egress needed for gas exploration, extraction and transportation, including pipelines, with such activities resulting in only reasonable necessary disturbance of the Property, (d) normal ingress and egress needed for road construction operations resulting in only reasonable necessary disturbances of the property, and (e) normal ingress and egress needed to effectuate other property resource development, with such development resulting in only reasonable necessary disturbance of the Property.

2.2. After recording this Declaration, these restrictive covenants may be altered by modification of the Permit pursuant to applicable Corps regulations and policy, provided all agencies that certified the Permit concur with the modification, and subject to consultation with other resource agencies as appropriate. Such modifications shall become a part of these restrictive covenants. Declarant may request to substitute in entirety property that is not encumbered by conservation easements or covenants for the Property herein, provided such substitute property is of equivalent functions and values as the Property herein, and is subject to equivalent conservation restrictions.

2.3. Any permit application, or request for certification or modification which may affect the Property, made to any government entity with authority over wetlands or other waters of the United States or waters of the State of West Virginia shall expressly reference or include a copy of these restrictive covenants.

2.4. It is expressly understood and agreed that these restrictive covenants do not grant or convey to members of the general public any rights of ownership, entry or use of the Property. These restrictive covenants are created solely for the protection of the Property and associated values. Declarant reserves ownership of the surface estate and all rights appertaining thereto, including without limitation the rights to exclude others and to use the Property for all purposes not inconsistent with these restrictive covenants.

2.5. The Corps, the WVDEP, and their authorized agents ("Regulators") shall have the right to enter and go upon the lands of the Declarant and its Others to inspect the Property and take actions necessary to verify compliance with these restrictive covenants. This right of entry is given with the understanding that the Regulators will conduct their actions hereunder entirely on its or their own behalf and not as agent or servant of the Declarant and its Others. The Regulators hereby indemnify and save harmless the Declarant and its Others and its and their officers, employees and agents from and against any and all claims, demands, suits, judgements, recoveries and liabilities, for injury to or death of any person or persons whomsoever and for loss or damage to any property whatsoever, to the extent allowable by law, arising or in any manner growing out of the operations or activities of the Regulators under or in connection with this right of entry; and the Regulators hereby indemnifies and saves harmless the Declarant and its Others and its and their officers, employees and agents from and against all penalties, fines, prosecutions, statutory recoveries (whether civil or criminal) and governmental actions which arise from or are occasioned by the operations or activities of the Regulators under or in connection with this right of entry.

2.6. The perimeter of the Property shall be plainly marked by a permanent marking system. If a survey of the Property is made, Declarant may substitute the survey description of the Property for Exhibit A hereto by executing and recording a supplement to this Declaration in form and substance necessary to effectuate such substitution.

2.7. The Declarant grants to the Corps, the U.S. Department of Justice, and the WVDEP a discretionary right to enforce these restrictive covenants in a judicial action against person or other entities violating or attempting to violate these restrictive covenants; provided, however, that no violation of these restrictive covenants shall result in a forfeiture or reversion of title. In any enforcement action, an enforcing agency shall be entitled to, from the offending person or entity, a complete restoration of the Property for any violation, any judicial remedy, costs and attorneys fees in which it obtains relief. Nothing herein shall limit the right of the Corps to modify, suspend, or revoke the Permit.

### **ARTICLE 3**

#### **BURDEN AND BENEFIT**

3.1. All of the restrictions imposed by this Declaration run with and burden the Property and all restrictions hereby imposed shall be deemed to be restrictions running with the land and shall be effective limitations on the use of the Property from the date of execution of this Declaration in perpetuity, subject to Article 4 hereof. All of these restrictions are binding on Declarant and each successive owner of the Property or any portion thereof, and upon each person having any interest in the Property thereof derived from any owner of the Property.

3.2. Declarant will incorporate (which may be by reference) its obligations under this Declaration into all future deeds or other transfer documents executed in the future by Declarant for the Property or any portion thereof or interest therein, and any grantees

or other transferees will be required to comply with this Declaration as if they were designated in this Declaration as Declarant and had executed this Declaration as Declarant.

3.3. The Property has natural, aesthetic, scientific, and educational values as a "relatively natural habitat of fish, wildlife, or plants or similar ecosystem," as the phrase is used in §170(h)(4)(A)(ii) of the Internal Revenue Code, as that section of the Code may be amended from time to time, and in the regulations promulgated thereunder.

3.4. Should any separable part of these restrictive covenants be determined to be contrary to law, the remainder shall continue in full force and effect.

#### **ARTICLE 4**

##### **EXPIRATION AND RECORDING**

4.1. It is a condition of execution and delivery of this Declaration by Declarant that if the Permit is not issued by the Corps within \_\_\_\_\_ (\_\_\_\_\_) months following the date first above written, this Declaration shall expire of its own accord without further action of any kind by any party, and shall be null and of no force and effect after the expiration of such time period. In addition, in the event the Corps permits the substitution for the Property of other property, which other property is not owned by Declarant, so that the substitution procedure of paragraph 2.2 above is not applicable, then the Corps agrees to provide Declarant with a properly executed and recordable instrument evidencing the expiration of this Declaration.

4.2. This Declaration shall not be recorded in the land records of the county in which the Property is located until after the Corps has issued the Permit.

**IN WITNESS WHEREOF,**

\_\_\_\_\_ being Declarant herein, have  
duly executed this Declaration of Restrictive Covenants this \_\_\_\_\_ day  
of \_\_\_\_\_, 200\_.

By \_\_\_\_\_

Its: \_\_\_\_\_

STATE OF \_\_\_\_\_

COUNTY OF \_\_\_\_\_ ,TO WIT

The foregoing instrument was acknowledged before me this \_\_\_\_\_ day  
of \_\_\_\_\_, 200\_, for and on behalf of said entity by \_\_\_\_\_  
its \_\_\_\_\_

My commission expires \_\_\_\_\_

(Notarial Seal) \_\_\_\_\_

Exhibit A

Property description(s) and Plates

of

area(s) to be mitigated

placed here