

## **Standards for Conservation Easement Holders for Mitigation Sites**

May 3, 2021

Under the Final Rule, Compensatory Mitigation for Losses of Aquatic Resources, 33 CFR Part 332, Subpart J (“Mitigation Rule”), all compensatory mitigation plans required for Department of the Army (DA) permits are required to address 12 fundamental components. One of these components is the “site protection instrument” (see 33 CFR 332.4(c)). The Mitigation Rule states that compensatory mitigation projects must be provided long-term protection through real estate instruments or other available mechanisms, as appropriate, considering relevant legal constraints (33 CFR 332.7(a)).

The site protection instrument or real estate mechanism must be approved prior to initiation of the permitted activity. Long-term protection must be in place before any credits can be released from a mitigation bank or In-Lieu Fee project site.

A conservation easement is a binding agreement between the landowner (Grantor) and another party called an easement holder (or Grantee) 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. The easement holder does not gain ownership or possession of the land, but does hold a real estate property interest. A conservation easement is the most secure form of site protection instrument and runs with the land.

Conservation easements held by state or local governments, other federal or state agencies, or non-governmental groups such as land trusts are preferable. However, other parties may be legally acceptable as the Grantee in Maryland. If it is not practicable to establish a conservation easement for the mitigation site, documentation of these efforts should be provided. The site protection instrument will not be approved until it has been satisfactorily demonstrated that establishing a conservation easement for the mitigation site is not practicable.

The following criteria will be used to determine whether the proposed conservation easement holder is acceptable and if any increased value of credits (up to 5%) for an approved conservation easement is warranted.

1. Grantee should be empowered to hold an interest in real property under the laws of the applicable State or the United States.
2. Grantee should have a stated conservation mission.
3. Grantee should be a qualified “land trust” in accordance with requirements of State law and regulations.

For example, consistent with the Md. NATURAL RESOURCES Code Ann. § 3-2A-01, “land trust” means a qualified conservation organization that:

(a) Is a qualified organization under § 170(h)(3) of the Internal Revenue Code and regulations adopted under § 170(h)(3); and

(b) Has executed a cooperative agreement with the Maryland Environmental Trust.

In Pennsylvania, the “land trust” is a qualified conservation organization under § 170(h)(3) of the Internal Revenue Code, is a nonprofit organization that is tax exempt under 501(c)(3) of the Internal Revenue Code, is registered with the Pennsylvania Commission on Charitable Organizations, and which has among its primary purposes the acquisition or conservation and preservation of interests in real property for the purpose of achieving open space benefits.

4. Grantee should be a nonprofit tax exempt organization pursuant to 26USCA 501(c)(3) of the Internal Revenue Code with a stated conservation mission. IRS evidence of non-profit status is required.

5. Grantee organization’s Board of Directors should have adopted the current Land Trust Alliance’s Standards and Practices as guiding practices of the organization. The *Land Trust Standards and Practices* is available from the Land Trust Alliance (LTA), 1250 H Street NW, Suite 600, Washington, DC 20005, telephone: 202-638-4725, website is [www.lta.org](http://www.lta.org) .

6. The Grantee should be accredited by the Land Trust Accreditation Commission, an independent program of the Land Trust Alliance.

7. Grantee Board of Directors, officers, and staff should not have a conflict of interest in regard to the wetland or streamside mitigation bank or permit issued by the Corps of Engineers or State. Written certification that the land trust board of directors, officers, and staff, as holders of the conservation easements, will not receive benefit, financial or otherwise, from the issuance by the Corps or State of the underlying permit or banking instrument. In addition, a copy of the land trust’s Conflict of Interest Policy may be required.

8. Grantee has successfully managed at least 2 other conservation easements. Summarize the qualifications of the Grantee to successfully execute and manage conservation easements. Include information describing the number and type of other easements that the organization holds, monitoring schedules, any experience with non-compliance, encroachment, or litigation and the outcomes, and available funding obligations to provide long-term management, monitoring, and/or stewardship of the real property.

9. Grantee should receive from the Mitigation Bank Sponsor or Permittee, or allocate, funds sufficient for the purpose of stewardship, monitoring, management, and legal defense. The use of these funds is restricted to these purposes and shall be deposited in a fund separate from the Grantee’s operational funds or as a line item separate from other budgetary categories.