

# **Best Practices and Performance Measures (BPPM) for Conservation Easement Programs**

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## EXECUTIVE SUMMARY

This paper introduces a new tool for the Nature Conservancy of Canada (NCC) and partner land trusts to help manage conservation easement programs in Canada. This newly-crafted set of Best Practices and Performance Measures (BPPM) was developed with input from a diverse land trust advisory group. The suite of best practices identified in this paper constitutes a selection of the fundamental ingredients -- the building blocks - of an effective conservation easement<sup>1</sup> program.

This project draws upon research conducted both in Canada and in the United States on what makes conservation easement programs successful and effective. It focuses on key elements of effective programs, describes the best practices associated with these elements, and provides examples of performance measures against which organizations can gauge implementation.

The practices are divided into two categories: Sound Practices and Emerging or Enhanced Practices, defined as follows:

**Sound Practices:** These are a comprehensive set of easement provisions, procedures and systems that result in easements that are legally binding, enforceable, and durable in perpetuity.

**Emerging or Enhanced Practices:** These easement provisions, procedures and systems represent a more highly developed “risk management,” or “enhanced” approach to easement drafting and stewardship; in some cases, they are not yet generally-accepted, and are thus “emerging” in the land trust community. They anticipate potential areas of misunderstanding and help to clarify roles and responsibilities between the parties more formally and with greater attention to future risks. They also assume that Sound Practices are in place and thus build upon them.

The goal of this project is twofold: first, to lay out a high-level set of practices to inform and guide the development of organizational standards and practices and second, to develop and put forward a tool with which the Nature Conservancy of Canada and other Canadian land trusts can evaluate and measure their current and future performance. The Sound Practices lay the foundation by providing a thorough suite of generally-accepted, prudent practices that most easement programs should strive to attain. The Emerging or Enhanced Practices provide reasonable longer-term goals for either testing new, more effective methods or implementation of more formal organizational systems and processes.

It is understood that each organization will need to assess its own capacities and weigh the costs and benefits of adopting particular practices in order to develop the set of practices that meets its needs. It is important, however, that an organization recognize the potential impact that modifications to or omissions of certain practices might have to the robustness of the easements program.

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<sup>1</sup> The word “easement” is used throughout this document for simplicity; the ideas are also applicable to servitude and covenant programs. The differences between these types of legal instruments have been noted where they are significant.

## **I. NEED FOR BEST PRACTICES**

### **A. Land Trust Community Self-Governance**

Throughout North America, the land trust community is self-governing: it establishes and seeks adherence to self-defined norms of behaviour. The activities of land trusts are governed by the same rules that apply to non-profit organizations generally; they are not actively regulated, beyond their compliance with certain programs in which they participate. Yet land trusts have a responsibility to ensure that their activities yield value to the public, and that their commitments to land protection are effective and will endure indefinitely.

#### ***1. United States Experience***

The land trust community in the United States is a strong and successful movement with over 1,500 land trusts in operation. These organizations, ranging from small, local groups to large, national organizations, have together protected over 9 million acres, at an ever-increasing rate – currently, 800,000 acres/year. Yet despite its reputation and momentum it has had a rocky ride in the past few years. In late 2003, the *Washington Post* published a series of articles detailing alleged instances of lax practices and questionable transactions involving a small number of US-based land trusts. This publicity elicited an investigation in Congress, which has resulted in recommendations from the Joint Committee on Taxation to eliminate many of the tax benefits currently allowed in the US for donated easements and bargain sales (partial gifts). The threat this poses to the effectiveness of conservation groups in the United States is significant.

The US-based Land Trust Alliance (LTA) is working to prevent the recommendations from becoming law by strengthening their commitment to the Standards and Practices they have already adopted, and recently updated, and implementing new programs to ensure better performance (see more below, Section I.B. of this report). Whether the Joint Committee's proposal becomes law and takes effect in its current form is, at this writing, uncertain. Regardless, the negative impacts on good land trusts doing good work are real, and the repetition of such history in Canada is something to be guarded against.

#### ***2. Canadian Experience***

The Canadian land trust community is younger and smaller than that in the US, which gives it the opportunity to learn from the US experience. But it too is growing and it is estimated there are over 90 land trusts in Canada. However, with this growth comes the increased challenge of obtaining sufficient resources to implement highly developed, rigorous conservation easement programs, and ensuring that sound, generally accepted practices are implemented consistently throughout those programs.

While easement donors in both countries receive tax benefits for these donations, there is a significant difference between the ways such benefits are delivered. Environment Canada's Ecological Gifts program adds accountability to the process. Under the Ecological Gifts program, appraisal practices are more directly scrutinized than in the United States.

In order to qualify for enhanced tax benefits, the easement's appraised value must be evaluated by a professional appraisal review panel, and subsequently approved by the Minister of the Environment. Easements are also reviewed by the EcoGift Program to check for basic legal provisions. These reviews provide a mechanism to root out abusive practices. This contrasts with practices in the US, where an appraisal is not normally reviewed by a regulator except in case of an audit by the Internal Revenue Service, which audits such donations infrequently.

## **B. Evaluation of Existing Tools for Conservation Easement Program Performance Evaluation**

Before embarking upon the project of developing a new set of best practices for conservation easement programs, research was conducted to ascertain whether a tool had already been developed for this purpose, including a mechanism to measure performance. Although this type of assessment tool was not found, there are several other documents which this project drew upon in its development.

### ***1. Standards & Practices***

#### **a) Provincial Standards and Practices**

Three provincial associations of land trusts exist in Canada: the British Columbia Land Trust Alliance (BCLTA), Ontario Land Trust Alliance (OLTA), and le Regroupement des organismes propriétaires de milieux naturels protégés du Québec (RMN). Each of these organizations has adopted Standards and Practices (S&Ps) based on the US Land Trust Alliance's S&Ps. Each asks its member organizations to commit to adhering to these S&Ps, and to publicly make that commitment by passing a Board resolution.

In other provinces, where there are no such umbrella land trust alliances, land trusts often do state their adherence to such a set of S&Ps, either derived from the US LTA's set of practices or from one of the provincial groups.

#### **b) US LTA S&P Revision Process**

The US LTA undertook a process in 2004 to update its S&Ps, which were developed originally in 1989, and went through revisions in 1993 and 2001. While they updated the whole document and made changes throughout, there were three themes that were highlighted throughout the revisions: management of conflicts of interest, standards for high ethical behaviour, and ensuring adequate stewardship capacity. They greatly expanded the number of practices regarding conservation easement project selection, stewardship and enforcement. These themes run strongly through the 2004 revisions to the S&Ps.

#### **c) Establishment of National S&Ps in Canada**

Canadian land trusts have, until now, functioned almost entirely at a provincial level. However, greater need for a national dialogue on land trust issues has emerged, and with it, the National Land Trust Coalition. This coalition is currently embarking upon a project to establish a set of national S&Ps. This addresses two needs: 1) Coverage

of land trusts outside of BC, Ontario and Quebec; and 2) agreement on one unified set of standards.

The coalition is, at this writing, using the US LTA's 2004 revised S&Ps as a basis for a new set of Canadian land trust S&Ps. The committee engaging in this revision process shares members with the committee that contributed to this report. The efforts are informing each other, but at the same time, their aims are different.

The national S&Ps go far beyond conservation easement programs. They address all organizational practices, from writing a mission statement to recruiting a Board of Directors to staff and volunteer management. They also include practices relating to conservation easement programs. In contrast, the Best Practices and Performance Measures (BPPM) table in this report focuses only on conservation easement programs, and pays particular attention to the contents of the easement itself.

## **2. *Other Tools***

### **a) TNC (US) Conservation Easement Working Group**

The Nature Conservancy (TNC) embarked upon a critical assessment of its conservation easement programs in 2003-2004. The Working Group spent nearly a year compiling and analyzing TNC's current policies and internal practices relating to conservation easements, considering revisions to these policies, and recommending a set of revised policies and practices. These policies and practices reflect a comprehensive approach to the conservation easement program, emphasizing decision making methods in the face of complex transactions and those with the potential to create a conflict of interest, the standardization and consistency of the policies across the organization, and strengthening of practices relating to stewardship and enforcement.

### **b) Updates of Existing Materials**

The US LTA has revised and updated its *Conservation Easement Handbook*, due for release in spring 2005, which details practices and policies in US-based conservation easement programs. It is a significant resource for Canadian land trusts, as many of the organizational practices are similar, notwithstanding differences in the laws between the two countries.

The useful guide to conservation covenants in British Columbia (also revised and updated from its original version), *Greening Your Title*, is scheduled to be released in the spring of 2005.

### **c) NCC Internal Practices**

The NCC has compiled two volumes to organize and disseminate its internal practices within the organization: the NCC Stewardship Manual and the NCC Land Securement Manual.

#### **NCC's Stewardship Manual**

In December 2000, NCC produced its first formal Stewardship Manual. The Stewardship Manual establishes the stewardship goals, principles and procedures for the organization. In April 2004, the 2<sup>nd</sup> Edition of the Stewardship Manual was released.

This manual builds on the principles outlined in the first edition and updates information throughout while adding a new section on Insurance and Risk Management.

NCC's Stewardship Manual is an important internal guidance document for both new and experienced NCC staff and it also serves as an external communications and educational tool for NCC partners and volunteer stewards. A copy of the Stewardship Manual has been distributed to dozens of NCC partners and volunteer stewards and it is posted on the NCC website for downloading by anyone who is interested.

The Stewardship Manual contains certain information relevant to this report:

- 1) **Stewardship Budgeting:** Details relating to short-term and long-term budgeting (Stewardship Endowment Fund) and approval of stewardship funds
- 2) **Easement Monitoring:** Monitoring protocols, schedules and forms
- 3) **Baseline Documentation Reports (BDR's):** Purpose of BDR's, how BDR's relate to monitoring reports, restrictions in the easement and the conservation targets being protected
- 4) **Landowner Relationships:** Working together with landowners to protect conservation targets, monitoring and dissemination of the NCC Stewardship Manual
- 5) **Easement Enforcement:** Easement Enforcement Guidelines

### **NCC's Land Securement Manual**

In December 1998, NCC produced its first Land Securement Manual. The manual was compiled to assist NCC staff and other conservation organizations in the design and implementation of land securement projects, utilizing the full spectrum of available tools. The manual provides both basic information on securement options as well as detailed analysis of specific conservation tools such as leases, life interest agreements and conservation easements, covenants and servitudes.

The NCC Land Securement Manual contains specific information relating to standards and practices for conservation easements, servitudes and covenants :

- 1) Approval and Execution of Documents Related to Land Transactions
- 2) Site Assessment Criteria
- 3) Guidelines for Review and Acceptance of Property Donations
- 4) Environmental Assessment Form
- 5) Property Securement Approvals Process
- 6) Template for Conservation Agreements
- 7) Guidelines for Ecological Gifts
- 8) Provincial Conservation Easement, Covenant and Servitude Legislation
- 9) Summary of Restrictions - Conservation Agreements

### **3. Performance Measures**

#### **a) LTA Program Development**

The US LTA is developing two different programs to address the need for external validation of the soundness of land trusts' management and practices.

LTA has embarked upon a process to create a new land trust credential. It is not yet determined what this will consist of or how it will take effect. The LTA has convened a task group to gather input from land trusts across the US regarding the idea, and to put together a proposal for how it would work. The primary feature of such a program would be that such a credential not rely only on voluntary compliance, but that there be some external mechanism to gauge performance. It would function as a type of seal of approval, giving the land trust and general communities a means to confirm the soundness of an organization's management and practices.

LTA is also continuing to develop an in-depth assessment tool, provisionally called a "module." Essentially, it is a very in-depth assessment of the organization, across the board. It is a tool that would be expected to require significant resources to implement (US\$10,000+), and would result in a detailed analysis of an organization's strengths and weaknesses.

It is possible that a credentialing system or an in-depth assessment tool would be of interest in Canada, but such programs would require significant investments to bring to fruition. The scale of the marketplace for these assessment methods is much larger in the US than it is in Canada, due to the larger number and size of land trusts there. Establishing a credentialing system also would require the land trust community to recognize and endorse the system, a process which would take a significant amount of time and resources to conduct. When they are made public in the US, these tools will usefully inform the question of whether to develop them in Canada.

#### **b) No Tools Known To Exist In Canada**

Research was conducted into the existence of such assessment tools in Canada. Other than voluntary assessment tools, such as those detailed in *Land Trusts: Measuring the Effectiveness of Conservation Easement Programs*,<sup>2</sup> there are no known efforts to measure performance in detail in Canada.

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<sup>2</sup> Katie Paris, "Land Trusts: Measuring the Effectiveness of Conservation Easement Programs," Nature Conservancy of Canada, unpublished manuscript, 2004.,.

## II. DEVELOPMENT OF BEST PRACTICES AND PERFORMANCE MEASURES

### A. Criteria for Choice of Format

#### 1. *Defining Best Practices*

Best Practices are divided into two classifications, Sound and Emerging or Enhanced:

Sound Practices: These are a comprehensive set of easement provisions, procedures and systems that result in easements that are legally binding, enforceable, and durable in perpetuity.

The standard we are developing calls for enough information to enable the Easement Holder to monitor the land, identify violations and enforce terms, and the Landowner to clearly understand what he or she may and may not do on the property under easement terms. Our standard is higher than merely *legally binding*; the minimum necessary practices to *legally bind* a parcel of land with a conservation easement are not as rigorous as the set of practices presented here.

Emerging or Enhanced Practices: These easement provisions, procedures and systems represent a more highly developed “risk management,” or “enhanced” approach to easement drafting and stewardship; in some cases, they are not yet generally-accepted, and are thus “emerging” in the land trust community. They anticipate potential areas of misunderstanding and help to clarify roles and responsibilities between the parties more formally and with greater attention to future risks. They also assume that Sound Practices are in place and thus build upon them.

The Emerging or Enhanced Practices present a more formal and thorough approach to easement drafting and stewardship. They situate the easement within organizational processes that support ongoing landowner-land trust relationships, systematic monitoring and enforcement, thoughtful financial and strategic planning, and staff, Board and volunteer training and development. Not all of these practices will be appropriate in every situation, so they should not necessarily all be implemented in every easement and in every easement program. Easement Holders should consider whether they represent a better alternative to current practices, and implement them if they make sense.

Practices are categorized in three different sections, each of which deals with a separate component of a land trust’s work:

- Section I: Provisions recommended for *every easement document* to ensure the parties clearly understand their rights and responsibilities and that the document is legally binding and enforceable;
- Section II: Practices which should be regularly adhered to within the *conservation easement program*; and
- Section III: A few *organization-wide* practices which will be very important to the success of the conservation easement program.

## **2. Defining Performance Measures**

“Performance Measures” are defined as the methods or tools the organization may use to verify whether it is achieving a certain level of performance. These do not, in general, constitute quantitative measurements, but are generally qualitative descriptions of tools and methods an organization can employ to measure performance. The “Performance Measures” developed in this report do not represent an exhaustive list of performance measures but rather some suggested ways in which an organisation could measure the success of each practice.

The format was chosen for the project based on several criteria:

### **a) Qualitative vs. Quantitative Indicators**

The basic concept of the project was to start with a comprehensive look at which terms are fundamental to an easement, and expand to an analysis of fundamental practices in easement programs and land trust organizations.

Section I of the project lists fundamental provisions, identifying areas of special concern with regard to provincial variation or variation in accepted techniques. This type of indicator is necessarily only measurable qualitatively as presence/absence or a “checklist” approach.

The remaining sections are also based on a “benchmarking” model, one that defines a practice qualitatively and then spells out the associated performance measure. Quantitative indicators are often too blunt to measure such performance. If the land trust’s adoption of a policy or procedure is the indicator being sought, often there is no quantitative measure possible for that practice.

Example: In Section II(B), regarding Landowner/Easement Holder relationships (see attached BPPM table), instead of measuring the ways that a land trust verifies that it is adhering to the set of defined practices, we could try to directly measure the outcomes. Directly measuring the *practices* means creating a written record of landowner interactions, appropriate methods of tracking transfers of land, etc. Measuring the *outcomes* means measuring the number of easement violations and/or requests for amendments. These “outcomes” measurements would probably be too blunt, however, as the cases of violations or requested amendments will generally be quite rare and might be an indicator of some other weakness in the land trust’s practices.

### **b) Measuring Practices vs. Outcomes**

Ideally, a set of overall indicators of a conservation easement program could be developed, using measurements of results instead of practices. However, there is no known set of data against which to compare performance in quantitative terms, and therefore such a set of indicators would not be of great utility at this point in the development of Canadian land trusts.

Again, using the above example, an attempt to measure outcomes might imply measuring the number of violations and/or amendments requested by landowners. However, there is no objective metric by which one could judge whether the measurement is too high or is acceptable. There simply is not enough data currently to support such conclusions.

## **B. Advisory Committee**

A group of land trust representatives (both executive and programmatic) was recruited to help guide the effort to write the Best Practices and Performance Measures.

### **1. Role**

The Advisory Committee's role was to review and critique written products of the research and writing team, both in written comments and in conference calls. The Committee met by conference call five times over the course of five months, discussing the contents of the BPPM table at length and providing information as needed from their organizational experiences.

### **2. List of Members**

The Advisory Committee includes:

Graham Bryan, Habitat Biologist  
Ontario Ecological Gifts Program, Environment Canada

Jeremy Collins, Coordinator – Acquisitions/Dispositions  
Ontario Heritage Foundation

Gary Goodwin, General Counsel/Director of Corporate Services  
Ducks Unlimited Canada

Allison Grose, former Director of Land Securement Practices  
Nature Conservancy of Canada

Raymond Kotchorek, Policy and Program Advisor  
EcoGift Program Secretariat, Environment Canada

Lisa McLaughlin, Stewardship Coordinator  
Nature Conservancy of Canada, Ontario Region

Terri Monahan, Executive Director  
Appalachian Corridor

Ron Reid, Executive Director  
Couchiching Conservancy

Bill Turner, Executive Director  
The Land Conservancy of British Columbia

### **3. Legal Review of BPPM Table**

The Best Practices and Performance Measures table was reviewed several times by lawyers with experience in conservation easement practice in various provinces.

The primary reviewer was Ann Hillyer, partner, Hillyer Atkins, of Victoria, BC. She provided written comments on the BPPM table once after its initial drafting, and once after it had been updated subsequent to the sample easement evaluation.

Two other lawyers reviewed the document: Karen Ray, NCC Legal Counsel, National Office, and Howard Hamilton, NCC Legal Counsel, Ontario Region. Both also provided written comments on the table.

## **C. Intended Use of BPPM Table**

### **1. *Review of Model Forms of Easement***

An easement holder's lawyer and/or director can use Section I to review and, potentially, revise the organization's model easement to incorporate important provisions that may not currently be used. Section I can also be used to evaluate past easement agreements for internal review purposes.

### **2. *Annual Review of Easement Program and Organizational Practices***

Directors, staff or volunteers can use sections II and III of this report to break down their current practices and analyze them, step by step. Depending on the size of the organization, different staff members (or in the case of an all-volunteer organisation, Board members) should be included in this review: lawyers, controllers or financial officers, fundraisers, and land securement staff or project managers. Such a review may prompt re-evaluation of certain practices, or the need to review or establish organizational policies relating to the practices.

#### **a) Training for Conservation Staff**

The tool is also potentially useful for training land securement and stewardship staff or project managers, to inform their thinking about the whole cycle of land securement and stewardship, and how the parts relate to each other. Section I, Fundamental Provisions, should also be used to train those negotiating easements, to ensure that they are aware of the ramifications of the different choices about restrictions and other language in the easements.

### **3. *Periodic Updating***

As conservation easements and easement programs continue to evolve over time, the best practices may be revisited and revised to reflect changes in easement legislation or other related information as it is developed.

#### **a) By lawyers**

Because the practice of drafting conservation easements changes over time, land trusts must track and incorporate changes in practice. Likewise, Section I of the BPPM table should be updated by land trust lawyers as changes in practice evolve. Any land trust can undertake this updating, and may also wish to customize the list of Fundamental Provisions to fit their provincial or particular circumstances.

#### **b) By regional/program managers**

Sections II and III, relating to conservation easement program and organizational practices, should also be periodically updated to reflect evolving, generally-accepted land trust practices, with special attention to any guidance that might be provided in jurisprudence on easements across Canada.

### **III. EVALUATION OF BPPM TABLE USING SAMPLE EASEMENTS**

To evaluate the BPPM table, eight sample easements from land trusts across Canada were used to “test” it. The document was evaluated for its usability, its specificity, and its content, based on reviews of written easements and telephone interviews with land trust staff that negotiated them and conduct stewardship on them.

The following observations and questions were generated by the evaluation process. It must be acknowledged that eight easements is a small sample size, and that no conclusive findings can be made based on such a small number of easements reviewed. The intention of the process was to make observations about our evaluation tool based on the actual contents of diverse easements and the feedback from land trust staff who negotiated their terms and oversee their stewardship. Advisory Committee comments provided valuable input into interpreting the results, and recommendations were incorporated into the table.

#### **A. How to Describe the Sets of Practices**

Different nomenclature for the two sets of practices was discussed amongst the Advisory Committee throughout the project (i.e., best practices, minimum practices, etc.). “Sound Practices” best reflects the notion that these practices are in fact setting out a comprehensive suite of generally-accepted, prudent practices for an effective conservation easement program. The practices represent the high level of achievement that an organization can move towards to help ensure that it has a strong, sound and perpetual easement program.

Emerging or Enhanced Practices was the label used to describe the next level or “value-added” practices, which prevailed over such terms as Additional or Alternative. The terminology was chosen to describe a practice which may be innovative or at times more formal, that may not yet be generally-accepted, and that may not be applicable in all circumstances.

#### **B. Conservation Values and Intent Statements**

In many easements, there was no separate, clear statement of conservation values. Either the easement referred to the attached baseline report to define conservation values, or they were implied within the Intent/Purpose.

There was little agreement among Committee members about the necessity and value of a separate “conservation values” statement. While it may not be generally a common practice, in some jurisprudence it is emerging as an important provision for a judge to rely upon in determining the basic purpose of the easement and a context within which to decide the facts. It is maintained as a Sound Practice but it may be defined within the Baseline Documentation Report, the Purpose/Intent statement, or by itself.

#### **C. Maps**

Most of the easements reviewed (7 of 8) did not include any actual surveys. A great variety of methods was used, from annotated, colour-coded aerial photographs to

simple computer-generated representations to no map at all. The current practices encompass a large range of approaches to the mapping question.

The overall impression is that there seems to be an unwritten “rule” about the accuracy of mapping: when there are no distinctions in restrictions or reserved rights in different zones or areas of a property, little effort is made to produce an accurate map. Trusts rely on the legal description or parcel identification and leave it at that. This seemed to be true even in some cases when there were improvements on properties or when there were underlying utility easements, etc.

Where there are different zones of land use and activities, more effort is made to produce a map, usually an annotated aerial photo, which shows these different areas. Even then, in many cases basic mapping conventions were not followed, such as providing a scale, date, directional orientation, author/photographer identification, etc. In general, it seems as though trusts are relying on the good faith of the landowner to understand and respect these zones rather than relying on airtight mapping and providing markers which can be identified on the ground.

Therefore, the report recommends as a Sound Practice the use of a map that follows typical mapping conventions, as discussed above, sufficient to allow both Landowner and Easement Holder to identify protection areas, and any zones, on the ground. In certain cases, this might be best accomplished with a survey. Surveys are, however, recommended as an Emerging or Enhanced Practice, particularly when there are different zones of protection and when the conservation values necessitate highly accurate designations which are clearly identifiable on the ground.

#### **D. Baseline Documentation**

A common practice that occurred in most of the reviewed easements is that an ‘abridged’ baseline is appended to the easement to be registered, but a complete baseline is also prepared, usually after closing, and is not registered. A complete, unabridged baseline usually includes photographs, whereas the registered version did not in any easement we reviewed, likely because photographs do not often meet registration requirements.

Two main observations were made: 1) When abridged baselines were included in sample easements, there were no accompanying references to complete, unabridged baselines. 2) It seems therefore quite important that the complete, unabridged document is identified in the easement and incorporated by reference. Moreover, Easement Holders should document the Landowner’s acceptance of the contents of the complete report when it is finished, either by obtaining their signature on it or, failing that, by confirming (by letter to the landowner) that they do not have any objections to its contents.

#### **E. Management Plan**

Our findings were that a Management Plan generally constituted less than one page, as an appendix to the agreement. In a few cases, in our judgment, the Management Plan strayed beyond the boundaries of the text of the easement and added new features – in one case, a new dispute resolution mechanism.

Our recommendation is that a Management Plan (MP) is generally not necessary and may only be needed in more complex situations, and in those cases, is only to

elaborate upon the land trust’s plans for monitoring and stewardship, not to enumerate additional responsibilities for the landowner. A few key guidelines: 1) An MP is not necessary in many instances, where the easement terms are not complex. 2) An MP should not include new obligations, rights, or restrictions not contained in the easement, but should only elaborate upon them. 3) An MP should not provide new dispute resolution mechanisms not discussed in the easement, as these may contradict what’s already been provided for. 4) Roles in the MP should be clearly delineated as between the Landowner and Easement Holder.

## **F. Miscellaneous Provisions**

There were many miscellaneous provisions which were included in the sample easements which hadn’t appeared in draft versions of the BPPM table, many of which are “boilerplate.” Based on our review of sample easements, the Miscellaneous Provisions were expanded, with two categories: the Sound Practices encompass all of the so-called boilerplate provisions and several provisions very commonly used in easement documents (e.g., Modification/Amendment), and the Enhanced Practices include practices that may not currently be standard practice but which may prove useful.

| <b><u>Proposed Sound Practices</u></b>                                 | <b><u>Proposed Emerging or Enhanced Practices</u></b>   |
|--|---|
| Notice to Parties  | Change in conditions surrounding property/ extinguishment clause (varies from province to province)                       |
| Registration of Easement   | Expropriation clause re. reimbursement of EH if property is expropriated  |
| Right of Assignment of Easement  | Merger doesn’t extinguish easement  |
| Severability   | EH right to erect signage and conduct publicity   |
| Modification/Amendment   | Agreement should be construed by the court to give effect to conservation values and the enforcement of the restrictions. |
| Binding on Successors/Enurement  | Landowner acknowledgement of independent tax/legal advice   |
| Headings   |   |
| Joint and Several  |   |
| Time of the essence  |   |
| Entire agreement   |   |
| Interest charges   |   |
| Gender and Number  |   |
| Applicable Law   |   |
| Further Assurances   |   |
| Failure to exercise and enforce rights does not waive rights in future |   |

## **G. Appraisals**

A question arose in discussions with some land trust staff regarding roles and responsibilities when it comes to commissioning appraisals and submitting information to the EcoGifts program. Technically, the Landowner applies for an EcoGift, but it is the Easement Holder who generally guides the process of the appraisal and completion of Ecogift application.

We define these roles in our practices in a way that acknowledges that the Easement Holder is the expert and gives technical assistance to the Landowner, but does not act as their agent or give tax/legal advice.

## **H. Stewardship Reserve Funds**

Our review of land trust practices found that few had focused on raising stewardship reserve funds to the levels set out in this report. As well, legal defence costs

were generally not included as part of the stewardship reserve funds when raised; the primary focus has been on direct stewardship costs.

The Sound Practice now requires a reconciliation of the budget estimated for an easement (which includes both legal and stewardship costs) and the actual resources available, given the wide variety in stewardship budgets and organizational methods to fund stewardship. Quantifying annual expenses, in a combination of stewardship reserve funds, operating funds, volunteer hours, and donated/in kind support, seems to be the most accurate way of verifying the adequacy of a monitoring/stewardship program, not the amount raised in a reserve fund.

## IV. IMPLEMENTATION

The information presented in this report is intended to provide a strong foundation from which organizations can evaluate their own programs and institute new and/or improved practices where warranted, leading to an overall strengthening of conservation easement programs in Canada. Effective communication and dissemination of this information to the people responsible for delivery of programs on the ground will be essential to making this happen. It is anticipated that provincial and/or national land trust alliance organizations will facilitate this process and complement the internal communications of the organizations themselves. Ultimately, it will be the responsibility of the individual organizations to assess their own needs and capacities and implement changes in a manner appropriate for them, recognising the potential impact that modifications to or omissions of certain practices might have to the robustness of the easements program.

Factors that will influence the schedule for potential implementation might include:

1. The strength of the organization's current conservation easement program (i.e., the state of an organization's current standards and practices and the degree to which change is required);
2. The size of the conservation easement program (i.e., the number of easements currently held; increase in number of easements/year);
3. The relative priority of evaluating and modifying its conservation easement program practices vis a vis other organizational priorities; and
4. The human resources and financial resources available to invest in this effort.

In order for an easement holder to evaluate its easement program and subsequently implement change, there must be consideration of the resources that the easement holder is able to dedicate to this purpose. The costs associated with the implementation of these best practices is difficult to predict and must be based on a feasibility assessment for each organization.

Staff or volunteer time is essential to completing this task. It is important to have a project leader assigned to manage this effort. The easement holder will require the assistance of legal counsel to review existing easement agreements, as well as help draft new agreements, if warranted.

Although personnel time may be the biggest resource required to implement the report's recommendations, other hard costs may also be required. Items such as fire proof cabinets for legal documents or software for digital file management systems may need to be purchased. There may also be costs directly associated with changes to practices on the ground. As such, it is understood that uptake among the land trust community will proceed at differing paces and may be phased in over a period of years. Organizations may also decide to prioritize practices, and implement in sequence as time and resources allow.

Easement holders should recognize, however, that these costs are an investment in their conservation easement program and could save money in the long-run by avoiding costs associated with legal defence.

## **V. BIBLIOGRAPHY/FURTHER RESOURCES**

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Paul Peterson, “Sample Annotated Conservation Easement,” unpublished, September 2000.

## **VI. BEST PRACTICES AND PERFORMANCE MEASURES (BPPM) TABLE**

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## I. CHECKLIST OF FUNDAMENTAL PROVISIONS OF A CONSERVATION EASEMENT

Most conservation organizations have their own model forms of easement<sup>1</sup> agreements that reflect their unique practices and practices in different provinces. Such model forms of easement provide a basis upon which to negotiate and tailor easements to the specific circumstances of each agreement. Each model form should incorporate a set of basic terms, which are contained in the checklist below. A lawyer knowledgeable in conservation easements, contracts, covenants and real estate law should be involved in the drafting of both the model form of conservation easement and in the tailoring of this form to each specific easement.

This checklist does not group the fundamental provisions under legal headers as they might appear in a given form, but under more general categories. It also does not attempt to provide the exact legal phrasing typically used in a legal document, but rather general concepts. A “Comments” column helps to clarify meanings, give examples, or explain differences in particular provinces. The list could be reorganized for use in particular provinces where the form tends to be consistent among land trusts in that province.

This project draws upon legislation in each province which is aimed primarily at conservation purposes, but does not attempt to draw upon other legislation, such as heritage and historic preservation legislation, that may be adapted to conservation purposes.<sup>2</sup> Not every province has specific legislation aimed at only conservation purposes.

A few notes about different practices in particular provinces:

In Quebec, servitudes are the primary tool of land trusts seeking to protect private land. Although Quebec law is based on the civil code, servitudes function much like common law easements: there must be two parcels of land owned by different parties; the servitude on the servient estate must benefit the dominant estate. Therefore there are significant differences between the form of a servitude in Quebec and the forms typically used in all other provinces. Significant areas of difference have been noted within the Comments section of the table.

In Manitoba, there is a prescribed form of conservation agreement. This checklist should be used carefully in Manitoba in order to avoid non-compliance with the statute and regulations.

For Saskatchewan, New Brunswick and Nova Scotia, certain provisions are legally mandatory and the drafter of an easement in any of these provinces must keep them in mind when following the checklist.

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<sup>1</sup> The term *easement* will be used throughout this table generically to include other similar instruments, such as servitudes or covenants.

<sup>2</sup> See Ann Hillyer, Judy Atkins, and Arlene Kwasniak, “Conservation Easements, Covenants and Servitudes in Canada: A Legal Review,” for a complete list and analysis of provincial conservation easement/covenant/servitude legislation. In Newfoundland and Labrador the *Historic Resources Act* was written primarily for historic preservation, but may in some cases be used for conservation purposes.

## A. The Basic Facts

Whether within recitals or within the agreement, an easement must state the basic facts up front. These facts lay the groundwork for the rest of the easement. All of the following fundamentals should be clearly identified, usually within the first several pages of the easement. Care should be taken to state these facts only once within an easement, as repetition can result in contradictory information.

| ✓ | <i>Sound Practices</i>   | <i>Comments</i>   |
|---|--|---|
|   | 1. Identify the Landowner (sometimes referred to in the easement as the Grantor or Easement Donor)   | The Easement Holder should search title to ensure owner or owners are correctly described and that all owners are included.   |
|   | 2. Identify the Easement Holder (sometimes referred to in the easement as the Grantee)   |   |
|   | 3. State the provincial or territorial statute which authorizes the granting of the easement.  | The provincial legislation generally applies to private land, thus easements over public land are not the subject of this project.  |
|   | 4. State qualifications of the Easement Holder to receive the easement under provincial statute.   | These qualifications vary by province, and should be researched specifically by any potential Easement Holder. Often, a short description of the Easement Holder's mission is included here.  |
|   | 5. Define the conservation values the easement seeks to protect, which must correspond to the authorized purposes in provincial easement legislation.  | This statement should describe the land, the ecosystem in which it is located, and other relevant features of the protected area, but may also include more specific conservation values. Choosing whether to define the conservation values more specifically, such as calling for the protection of a particular endangered species, will depend on the goals of each easement. While it may be legally sufficient to rely upon the Baseline Documentation Report and/or the Purpose/Intent statements (both discussed below) to define the conservation values, it may enhance the easement to separately and clearly state the conservation values. |
|   | 6. State Landowner and Easement Holder's specific, common purpose (or intent) in conserving the property and its conservation values, which should relate to the statement of conservation values (above). | This statement should (1) relate directly to the purposes authorized by the province's enabling legislation; and (2) specifically note that it is the intent of both the Landowner and Easement Holder to accomplish such conservation. The purposes must also be within the permitted purposes of the Easement Holder and its documents of incorporation.  |
|   | 7. State the consideration (e.g., monetary or other) received by the Landowner.  | In the case of donated easements, it is possible to list no consideration other than the easement terms themselves. In the case of ecological gifts (as certified by Environment Canada), a nominal amount of consideration, such as \$1 or \$2, is acceptable.   |

| ✓ | <i>Sound Practices</i>  | <i>Comments</i>   |
|---|---|---|
|   | 8. State the term: In almost all cases, in perpetuity.  | For the Ecological Gifts Program, the term must be in perpetuity.<br><br>In Ontario, the term is sometimes listed as a very long time period rather than perpetuity. The Land Titles Act of Ontario Section 119(9) authorizes deletion of agreements with no specified term 40 years after registration. Therefore in Ontario, lawyers sometimes advise using a term of 999 years or some other very long time period instead of perpetuity in order to prevent the future deletion of the easement. Despite this certain but very long time period, the Ecological Gifts Program has thus far accepted such easements in Ontario. However, the Canada Revenue Agency may ultimately have authority to determine this question if it ever arises. The U.S. IRS also requires easements to be in perpetuity in case a donation is ever accepted on a property for which a U.S. donation receipt is to be issued. |
|   | 9. Define the protected area by including or referring to its registrable legal description (see Section I.F).  | This can be included within the easement text or, if the legal description is very long, by attachment as an exhibit, and incorporated by reference into the easement text.   |
|   | 10. Provide a detailed map or site plan as an exhibit (see Section I.F).  |   |
|   | 11. The Landowner and Easement Holder acknowledge that the current condition of land is described in the Baseline Conditions/ Documentation Report (see Section I.F). |   |

| ✓ | <i>Emerging or Enhanced Practices</i>   | <i>Comments</i>   |
|---|---|---|
|   | 11. A survey of the property is attached as an exhibit (see Section I.F).                     |   |
|   | 12. A definition section defines all specialized terms and terms of art used in the easement. | Such definitions may be useful in settling future disputes.   |
|   | 13. Statement of the public benefit to be derived from the easement.                          | A carefully drafted statement of public benefit often adds to the overall defensibility of the easement if it is challenged. It provides additional defences against future challenges that the easement is no longer needed due to circumstances such as changes in conditions that, in some situations, could support an application to remove restrictions from title. |

## B. Restrictions on Land Use and Reserved Rights

The easement’s fundamental function is to describe activities and land uses that it seeks to restrict. It also may allow certain reserved rights, or activities and land uses that the Landowner retains the right to continue to engage in on the land. Restrictions and reserved rights must be read together to understand the actual restrictions on land use required by the easement, and specialized terms must be defined.

The selection of which activities to restrict and allow should be tailored to each easement through the project planning process. Easements must strike a balance between restricting major activities that may impair important conservation values and “micromanaging” all activities. This balance also depends on what the landowner is willing to protect and what the easement holder has the interest and capability of protecting.

To determine which restrictions are necessary, the Easement Holder must look first to the conservation values and the purpose of the easement: What is being protected? What are the conservation strategies that are to be used to achieve this? What is the Easement Holder’s ability to monitor and enforce restrictions contained in the easement? The choice of which specific restrictions to include should arise from this analysis.

It is optimal to enumerate the key reserved rights, *and* to include a general statement that any rights not restricted are reserved by the Landowner. (This default is true whether or not it is so stated.) Spelling out reserved rights minimizes the chance that misunderstandings will arise later regarding the activities the landowner intends to continue to engage in on the property. Reserved rights should be defined in as much detail as necessary to explicitly limit each activity. Moreover, certain activities may require further written ‘permissions’ or approvals from the Easement Holder; any such approvals should be documented. If there are multiple protection zones within an easement, such as a homestead/residential area and a separate habitat area, the easement should be very clear about any differences between the restrictions and reserved rights in each area.

The following is a list of activities and land uses that would typically be restricted; but any of the following is also potentially a reserved right. This should be regarded as a conservation ‘menu’, from which Easement Holders can choose to create an easement tailored to its particular circumstances. There is no distinction between Sound and Emerging or Enhanced practices in this section.

| ✓ | <b><i>Land Use or Activity to be Restricted or Reserved</i></b>   | <b><i>Comments</i></b>   |
|---|---|--|
|   | 1. Development rights; constructing new improvements (buildings, structures, camping accommodations, trailers, mobile homes, pavement, fences, signs, etc.) | Restrictions on building are included in most easements; in many cases, exceptions are made for foreseeable needs, such as an additional home or barn on a particular site, replacement or conversion of existing structures, or a new parking area for visitors. These provisions should be very clear and as specific as possible (e.g., allowable size and height of buildings, their precise locations and use, etc.). |
|   | 2. Building new roads and trails or expanding existing ones.  | This is a restriction included in most easements, with exceptions for reasonable further needs relating to maintenance, restoration, and public use. Restrictions might also include definitions distinguishing roads from trails, in terms of maximum road widths and allowable materials for road and trail surfaces (e.g., gravel but not asphalt).   |
|   | 3. Altering topography, water courses, wetlands, or shorelines.   | Again, this is a restriction contained in most easements. Exceptions might be made for potential restoration projects or as needed for allowed uses (e.g., farming).   |

| ✓ | <b><i>Land Use or Activity to be Restricted or Reserved</i></b>                                  | <b><i>Comments</i></b>   |
|---|--|--|
|   | 4. Drainage of any surface or subsurface waters.   | In some cases, such as when agricultural uses continue on the land, some drainage practices may be allowed. If a well is in active use, or a water diversion occurred prior to the easement, there must be exceptions. Moreover, Easement Holders should take care not to restrict their own ability to conduct restoration work on the site.  |
|   | 5. Pollution; release or dumping of any toxic substance, waste or garbage                        | Exceptions to such restrictions should almost never occur.   |
|   | 6. Timber harvesting or removal of other native vegetation                                       | Typical exceptions to this type of restriction include sustainable harvesting with clearly quantifiable yields in forestry plans approved and incorporated as part of the easement (or contemplated in the easement and revised periodically); personal use for firewood, with limits; removal of deadwood or diseased trees; non-economic gathering of forest products for personal use (e.g., berry picking); or cutting of vegetation in emergencies.   |
|   | 7. Farming   | The conservation values would inform whether this is restricted or allowed. If farming is allowed, in certain cases restrictions may be included to prevent change in the fundamental nature of the land use (e.g., conversion from rangelands to intensive cultivation, or conversion from crop cultivation to poultry operations). This would depend on the overall intent of the easement.  |
|   | 8. Livestock grazing or ranging  | In some cases, this use is appropriate to the ecology; in other cases, it may need to be restricted. If allowed, some restrictions may be applicable: the number of livestock, calf operations, rest years, restricting supplemental feeding of hay or grain (i.e. introduction of non-native species), the amount of time annually the livestock can be present on the property, appropriate watering sources, and so on.   |
|   | 9. Use of pesticides, herbicides, fungicides or other agrochemicals                              | This restriction may be useful if it is central to the purpose of the easement; this must be determined on a case by case basis. Easement Holders should consider whether they have the capacity to monitor and enforce it. For example, monitoring for this restriction could entail taking soil samples for chemical analysis.   |
|   | 10. Introduction of exotic plant or animal species   | Exceptions to this restriction should be only with Easement Holders' approval, for control of other noxious exotics, for instance, and only in rare circumstances. Care should be taken to define terms precisely in order to avoid confusion about what is and is not exotic.   |
|   | 11. Use of vehicles off road   | It is not necessary in all cases to prohibit off road vehicle use; in some cases, the type of allowable off road vehicle may be specified. In some cases the use of off road vehicles may be needed for monitoring. Alternatively, the impacts of vehicle use may be restricted, such as cutting ruts into soils or causing erosion or soil compaction. Easement Holders should consider their ability to monitor and enforce this provision; a general prohibition may be much easier to monitor than one that allows specific types of vehicles. |
|   | 12. Granting other easements over the same property without the approval of the Easement Holder. | This is an important feature in most easements, to prevent a Landowner from allowing another easement, such as an access easement, to further bind the property in a way that might not technically be prohibited elsewhere in the easement, but which could have negative consequences for the conservation values. It is important to note that once a landowner has given away rights to an easement holder, it cannot give those same rights away to another party.  |

| ✓ | <b><i>Land Use or Activity to be Restricted or Reserved</i></b>                                     | <b><i>Comments</i></b>  |
|---|---|---|
|   | 13. Subdivision or severance of the property  | <p>Any exception to this restriction should be narrowly crafted; typically this right is extinguished in most easements. If a Landowner retains this right, typically a site plan would show specific home sites to be subdivided in the future, or the subdivision is accomplished before the easement is placed.</p> <p>If some exception is contemplated, it is essential to ensure that in the relevant jurisdiction, subdivision will not compromise the force and effect of the easement on any new parcel created after the easement is placed.</p>  |
|   | 14. New residential, commercial or industrial uses  | <p>Although these restrictions are common, they should only be used with some specific goal in mind. In most cases, such uses are implicitly prohibited by the other restrictions (such as no further improvements, no alterations of topography, etc.) This restriction should therefore be used thoughtfully, so as not to prevent new commercial uses that are both not foreseeable and not harmful (e.g., beekeeping, guided nature tours, home offices). Moreover, any such restrictions must be consistent with allowed uses such as farming, grazing, etc. Another alternative is to make new uses subject to the consent of the easement holder, not to be withheld unreasonably.</p>   |
|   | 15. Mining, both surface and subsurface   | <p>In many cases, mineral rights, either surface or subsurface, are severed from the fee estate in the land. In such cases, easement holders must research carefully who holds the rights. If the mineral right is feasible to exploit economically, the Easement Holder should weigh this heavily in determining whether to accept the easement. It may be useful to include a restriction on mining in any case, in case the landowner acquired the mineral rights in the future.</p> <p>In certain provinces, aggregate (surface mineral rights) is not severed from the fee estate. In such provinces, a restriction on mining is significant and necessary. Easement holders should research this point in relation to the jurisdiction in which they are operating.</p>   |
|   | 16. Control of predatory animals by specified methods   | <p>This is not a typical restriction, but may be important in certain circumstances. Easement Holder approval of such activities would be typical.</p>  |
|   | 17. Hunting, trapping or fishing.   | <p>The need to restrict these activities for the conservation values will vary in each case. In some parts of Canada hunting is consistent with the conservation values being protected. Typical exceptions would allow non-commercial such uses, or would allow them with exceptions for certain species, or on certain portions of properties. Easement Holders must evaluate whether they have the capacity to monitor these activities and the desire to enforce them.</p>  |
|   | 18. Public access to the property and passive recreation (e.g., hiking, camping, horseback riding). | <p>Public access to private land covered by an easement is not the usual case and differs from the need to provide access to the easement holder for monitoring and other purposes. If public access does not compromise conservation values and the Landowner is comfortable with it, it may be allowed. Such access should be specifically limited to certain areas or paths; activities such as swimming, picnicking, horseback riding, bicycling and camping should be specifically allowed and/or limited as well. When considering whether to grant public access, the additional liabilities such access might impose should be understood, as well as the additional need for monitoring and enforcement of such access. The landowner should be sure to get advice on this specific point as part of the independent legal advice the landowner obtains.</p> |
|   | 19. Loud noise and bright lighting  | <p>In the rare cases when it is relevant to the purpose of the easement, it may be desirable to restrict loud noise on the site and/or bright lighting at night. Easement Holders must evaluate whether they have the capacity to monitor these activities and the desire to enforce them.</p>  |

### C. Landowner's Commitments and Responsibilities

In most easements, the Landowner attests to certain statements and agrees to certain obligations. If such statements are not included in the easement text, the Easement Holder risks creating misunderstandings with the Landowner about his/her responsibilities for ongoing property maintenance, payment of property taxes, and other maintenance and property management issues.

| ✓ | <i>Sound Practices</i>  | <i>Comments</i>   |
|---|---|---|
|   | 1. If necessary in the jurisdiction, marketable title is warranted by the Landowner.  | In BC and any other jurisdiction where the subject land is under a Torrens system, this is not necessary.   |
|   | 2. A detailed description of exceptions to title and encumbrances is included, such as access or utility easements.             | Prior financial encumbrances such as mortgages must be postponed in favour of, or subordinated to, the easement. An easement will not qualify as an Ecogift if it has a prior financial encumbrance that has not been removed or subordinated.  |
|   | 3. Landowner continues to have the obligation to maintain property, including existing improvements and act as a prudent owner. | Such improvements could include buildings, driveways and roads, fencing, water supply and waste disposal systems, utility lines, signs, etc. The objective is to ensure that the Easement Holder does not inadvertently take on such responsibilities, and that failing improvements (such as fences in disrepair) do not somehow threaten any of the conservation values or compromise the ability of the Easement Holder to conduct monitoring. |
|   | 4. Landowner retains all rights not restricted or prohibited in and not inconsistent with the easement.                         |   |
|   | 5. Landowner continues to pay property taxes, rates and fees levied on the property.  |   |
|   | 6. Landowner gives notice of sale or transfer of land to the Easement Holder.   | See also Practice 9, below, under Emerging or Enhanced Practices.   |

| ✓ | <i>Emerging or Enhanced Practices</i>  | <i>Comments</i>   |
|---|--|---|
|   | 7. Landowner indemnifies Easement Holder against any liabilities arising from the Landowner's actions on the land. | This is optional, but a good way for Easement Holders to protect themselves from unforeseeable liabilities relating to ongoing use of the property. If there is any cause for concern about pollution on the property, a similar release should be sought regarding any contamination on the site.<br><br>The Landowner will also want to be indemnified against Easement Holder's actions on the land. |

| ✓ | <i>Emerging or Enhanced Practices</i>   | <i>Comments</i>   |
|---|---|---|
|   | 8. Landowner carries comprehensive general liability insurance on property.   | This is optional, as it may be inappropriate in some cases, prohibitively expensive, or unavailable. When possible, the Easement Holder should ask that they be added as an additional named insured on such policies.  |
|   | 9. Landowner has an affirmative obligation to provide to the Easement Holder an assumption of interest agreement by new landowners when property is sold/transferred. | <p>The objective is to help the Easement Holder to keep track of land sales and to have an opportunity to know the identity of new landowners. Some land trusts include in this provision a statement that until an assumption of interest is provided to the Easement Holder, the former Landowner remains liable for breaches of the easement terms. This gives a strong incentive to the Landowner to adhere to this provision and provide the assumption of interest.</p> <p>The objective of having notice of a transfer of property can be accomplished in other ways. For instance, some Easement Holders include a clause giving them a right of first refusal on any sale of the property. This provides a notification of any pending sale, even if they choose not to exercise the right.</p> <p>Another mechanism is a transfer fee, in which the owner agrees to pay some portion (e.g., 1%) of the value of the lands if and when they are sold to another owner. In this way, the owner gives notice of the sale, and the Easement Holder is able to recuperate funds upon the sale. (see also Section II.B of this table)</p> |
|   | 10. Landowner keeps property free of liens.   | While subsequent liens do not technically weaken the durability of the easement, they could result in a change of ownership and invite challenges to the easement by lien holders.  |

## D. Easement Holder's Rights and Responsibilities, Enforcement and Remedies

The Easement Holder must have clear rights to access the land and conduct monitoring, and remedies when a Landowner breaches easement terms. While the Easement Holder may rely on a process within the courts to address conflicts that may arise, it is also possible to prescribe alternative dispute resolution mechanisms within the easement. Such mechanisms should be thoroughly analyzed and considered before they are employed.

| ✓ | <i>Sound Practices</i>  | <i>Comments</i>  |
|---|---|--|
|   | 1. Right of access  | <p>Easement Holder must have a right of access to enter upon the property. This provision should include responsibilities for Easement Holder's notification of Landowner of such access and exceptions in certain cases, such as emergencies, and is commonly limited to twice annually.</p> <p>In BC, it is recommended that the agreement include a provision giving the Easement Holder the statutory right of way under Section 218 of the Land Title Act to make the covenant valid. Some covenant holders must be designated by the BC Minister of Sustainable Resource Management to be able to hold a section 218 statutory right of way.</p> |
|   | 2. Right of monitoring  | Easement Holder has a right to monitor the condition of the land. In some cases, the ways the Easement Holder plans to conduct monitoring may be detailed.   |
|   | 3. Process for pursuit of remedies when Landowner breaches easement terms | In case of default on the part of the Landowner, there should be a process for Easement Holder to follow to pursue a remedy. Typically, the Easement Holder has an obligation to give written notice to Landowner of its objections to the activities, an expectation of remedy within a fixed time period, right of entry and remedy if Landowner remains out of compliance, and a right of recovery of costs.  |
|   | 4. Right to conduct restoration   | Easement Holder has the right to enter upon the land for purposes of construction, demolition, maintenance, repair, restoration, etc., to protect and restore the conservation values where there has been a breach of easement terms.   |
|   | 5. Right to enforce restoration   | <p>Easement Holder has the right to compel the Landowner to restore areas damaged by activities of Landowner, and to recover costs for such enforcement.</p> <p>In BC, one tool to enforce the covenant is a "rent charge" registered under the Land Titles Act, when it can be negotiated with the landowner. However, compensation should not be limited by the existence of this rent charge.</p>   |
|   | 6. Emergency access and remedies  | Easement Holder may pursue remedies immediately in the case of urgent need to mitigate damage to the property or in other types of emergencies such as protecting human safety.  |
|   | 7. Force Majeure/Acts of God  | Neither party is liable to the other for damages caused by natural disasters or causes beyond their control (often referred to as Acts of God or Force Majeure).   |

| ✓ | <i>Emerging or Enhanced Practices</i>  | <i>Comments</i>  |
|---|--|--|
|   | 8. Right of injunctive relief  | Easement Holder has a right to stop activities that are inconsistent with terms of easement. This can be a powerful and important tool if processes for remedy are stalled or are not fruitful, and the Easement Holder can persuade a court to place an immediate stop to harmful activities. Whether this recourse is available to an Easement Holder may vary by province.  |
|   | 9. Compensation for damages is based on cost of restoration, not current value of land.  | <p>Compensation of Easement Holder for damages can be based upon the restoration of the land to its natural state before the damage occurred rather than the diminution of the land value. In some cases, land value may improve after damage, if the land becomes more buildable, for instance.</p> <p>In some provinces, penalties for damages may be established in advance by a formula, as is the case for the “rent charge” in BC. This may not be appropriate for all kinds of damages.</p>   |
|   | 10. Parties may choose to specify a mechanism for settling disputes outside of court. Commonly used mechanisms are mediation or binding arbitration. | <p>Mediation and binding arbitration have different implications, which should be explored with a lawyer before specifying them.</p> <p>Binding arbitration is often used to avoid high costs of litigation, although it also can result in substantial costs. If binding arbitration is to be used, the parties must ensure that the arbitrators have appropriate expertise, since there is no further recourse.</p> <p>Whether or not these methods are chosen, the Easement Holder should strive to negotiate the right to injunctive relief as well, in order to stop harmful activities without having to wait for an arbitration or mediation process to run its course.</p> |
|   | 11. Signage/Publicity  | Easement Holder may erect signage on property and otherwise acknowledge publicly the existence of the easement.  |

## E. Miscellaneous Provisions

| ✓ | <i>Sound Practices</i>  | <i>Comments</i>   |
|---|---|---|
|   | 1. Clear provisions for Notice to each party  | Notice provisions should include all contact information, and require updating such contact information when necessary.   |
|   | 2. Right of assignment of easement to another Easement Holder.                      | <p>Environment Canada must approve of any assignment of an easement that has been certified as an ecological gift as per Section 207.31 of the Income Tax Act.</p> <p>In BC, there must be a dissolution clause, in which another Easement Holder is named as a backup holder of the easement if the easement holder ceases to exist as an organization. An alternative and common approach in BC is to have two organizations hold the easement jointly from the start.</p> <p>In Alberta, the Easement Holder must have stated within the documents by which it is incorporated in the Province of Alberta the name of another qualifying organization to which its easements would be transferred if it were to cease to exist.</p> <p>In Quebec, the servitude cannot be transferred to another Grantee unless the dominant property is transferred as well, or the Grantee has a dominant property which would derive some benefit from the servient property being transferred.</p> |
|   | 3. The easement must be registered against title.                                   | The obligation to register the document is normally the Easement Holder's, but can be assigned to the Landowner as well. Some provinces, for example, Alberta, Saskatchewan, and Manitoba, have other notice requirements which must be met before the easement can be fully registered. In Nova Scotia, the easement must also include the certificate of a qualified solicitor setting out the legal effect of the document when it is registered.  |
|   | 4. Failure to enforce or exercise rights does not waive these rights in the future. | This protects against future actions by Landowners to invalidate the easement based on the Easement Holder's past nonenforcement.   |
|   | 5. Severability   | Invalidation of one part of the document does not invalidate the whole.   |
|   | 6. Amendment  | <p>Any modification of the easement, if permitted by the enabling legislation must be with consent of both parties, and must not materially weaken easement terms.</p> <p>If the easement is an Ecogift, it is necessary to have the consent of Environment Canada before modifying easement. See Income Tax Act s. 207.31 re change of use.</p>  |
|   | 7. Entire Agreement   | There are no understandings or agreements, verbal or otherwise, between the parties except as set out in the easement. Everything the parties are relying on is included in the document.   |
|   | 8. Enurement or Binding on Successors   | The agreements contained in the document are for the benefit of and are binding upon not just the parties but their successors and assigns.   |
|   | 9. Further Assurances   | The parties will do what is necessary and provide documents as necessary to ensure the agreements contained in the document are given effect.   |

| <b>✓</b> | <b><i>Sound Practices</i></b> | <b><i>Comments</i></b>  |
|----------|-------------------------------|---|
|          | 10. Headings                  | Headings are for reference only and do not have legal meaning.  |
|          | 11. Time of the Essence       | Time is of the essence in the agreement.  |
|          | 12. Interest Charges          | Specifies interest charges to be levied on any amounts owing from one party to the other.   |
|          | 13. Gender and Number         | Agreement shall be read with such changes of gender and number as the context requires. Any reference to a person shall be deemed to include a corporation, partnership or trust. |
|          | 14. Joint and Several         | If Landowner is more than one person his/her obligations shall be joint and several.  |
|          | 15. Applicable Law            | Specifies that the laws of Canada and the province govern the provisions of the agreement.  |

| <b>✓</b> | <b><i>Emerging or Enhanced Practices</i></b>  | <b><i>Comments</i></b>   |
|----------|---|--|
|          | 16. Landowner acknowledgement that she or he has obtained independent legal and tax advice.                 | The importance of the Landowner seeking and obtaining his/her own legal and tax advice can be highlighted and reaffirmed by placing such a statement in the easement itself.   |
|          | 17. Change in Conditions/Extinguishment   | The easement is not extinguished when conditions surrounding the property change. Although law governing this provision varies by province, and must be researched, it may help to defend the easement in the future against such claims where it is allowed.  |
|          | 18. Expropriation/Eminent domain  | If the government expropriates the land or part of the land, compensation should be due to the Easement Holder as a ratio of the easement value to FMV. In many cases governments are compelled to expropriate partial interest holders in lands. Including this provision offers an opportunity to define the formula for recovering costs, according to appraisals performed at the time of the easement donation. |
|          | 19. Merger of Landowner and Easement Holder does not extinguish easement.                                   | Because the legality of this provision may vary by province, Easement Holders must research what relevant provincial statute says in this regard.  |
|          | 20. A Consent to Assignment should be obtained from any organization named as a backup holder of easements. | This is to ensure that the organization named as a backup easement holder consents to do so and has adequate resources to do so.   |
|          | 21. Construction  | The agreement should be construed by the court to give effect to conservation values and the enforcement of the restrictions.  |

## F. Exhibits

An Easement Holder must clearly define the protected area, and the two primary tools to do this are (1) a legal description that is recognized by the provincial office of land registry and (2) a map which shows any features of the land pertinent to the restrictions and reserved rights. As noted below, a map is not a legal requirement in most cases, but it is a valuable tool in documenting the improvements to and the natural features of the land.

Easement drafting practices vary substantially regarding Baseline Documentation Reports (BDR): many land trusts attach a BDR to an easement as an exhibit, though this practice is not legally mandatory. It is perhaps a more efficient practice to draft the easement in a way that eliminates the need to attach and register the

BDR against title. This eliminates the possibility of introducing new information in the BDR which compromises the easement, and also eliminates the necessity of creating two BDRs – an interim (abridged) version as an exhibit and a complete one including photographs.

We refer to BDRs here because it is important that if one is attached as an exhibit, especially in an abridged or interim format, other practices need to be followed to ensure that a complete, final BDR is prepared and referred to in the easement.

All of the following practices are Sound Practices, except where noted in the discussion of maps.

| ✓ | <i>Practices</i>  | <i>Comments</i>  |
|---|---|--|
|   | 1. Provide a registrable legal description of the property. | <p>As stated above, the legal description may be included within the easement text if it is short, but often it is appended as an exhibit. The Easement Holder must ensure that, if the protected area is a smaller area within a legally-described parcel of land, an accurate legal description of the protected area is obtained and used.</p> <p>There are additional requirements in certain provinces:</p> <p>In Ontario, the Planning Act requires a consent process to place an easement on less than a whole parcel; if this process is successfully pursued, the legal description should apply only to that portion being protected by the easement.</p> <p>Under Ontario’s Surveys, Plans, and Descriptions of Lands Regulation the registrar may request a plan or survey or other descriptive plan for easements in order to correctly identify the area covered. The Easement Holder should contact the registrar prior to registration to ensure the registrar’s requirements are met.</p> <p>In Alberta, the Easement Holder must work with the appropriate Registrar prior to registering the easement to ensure that an adequate boundary description accompanies the easement.</p> <p>In Nova Scotia, an easement must include a legal description of the whole parcel, using a metes and bounds description, a survey or a unique parcel identification number; in addition, a sketch of the lands subject to the easement is required. New Brunswick has a requirement for a sketch or description of the land subject to the easement <i>if</i> the lands subject to the restrictions are less than the whole legally described parcel.</p> |

| ✓ | <i>Practices</i>  | <i>Comments</i>   |
|---|---|---|
|   | <p>2. Provide a detailed map or site plan as an exhibit, especially in circumstances where different zones of the property are subject to different restrictions.</p> | <p><u>Sound Practices</u></p> <p>A map is not strictly necessary for every easement<sup>3</sup>, but it is a Sound Practice to include one to show pertinent features of a property, such as improvements, boundaries, and areas or zones of the property to which different restrictions may apply. While surveys are often the best way to do this, they may, in some cases, be prohibitively expensive or infeasible, so other mapping methods must be used. Any non-survey maps created by the Easement Holder should include directional orientation, a scale, a legend of any notations on the map, an identification of the mapmaker, a date, and any other information necessary to identify and interpret the map, such as ground markers that can help tie it to features on the ground.</p> <p><u>Emerging or Enhanced Practices</u></p> <p>When financially feasible, surveys are often the best tool to create the most accurate and defensible map of land subject to an easement.</p> <p>GPS delineation is useful to designate different areas, or zones, of the property to which different conservation restrictions apply. GPS coordinates should be used with caution, however, when the GPS device’s margin of error is significant with respect to the restricted area(s) being identified. Some newer, expensive GPS devices have very low margins of error; when used, the device’s margin of error should be noted on the document. A map using GPS may not be accepted by land registry offices and may not be satisfactory evidence of boundaries, so this should be researched with land registry offices before proceeding. Finally, there is no credential or certification for GPS operators; thus the use of GPS coordinates as evidence is weaker than that of a survey.</p> <p>Aerial photographs annotated to show different protection areas or different expected land uses are used often as an alternative to maps. However, there may be problems registering photographs and the land registry office should always be consulted to determine if they will be accepted. If using aerial photographs, it is crucial to use all of the basic mapping conventions. Include a scale, legend, date, photographer, and any other relevant identifying information.</p> <p>No known case history has tested the evidentiary sufficiency of the use of GPS and/or aerial photographs in this context, so both should be used only when surveys are infeasible.</p> |

<sup>3</sup> Except as noted above, under Legal Description, in certain provinces.

| ✓ | <i>Practices</i>  | <i>Comments</i>  |
|---|---|--|
|   | <p>3. Current condition of land is described in a Baseline Conditions Documentation Report which is referenced in the easement.</p> | <p>It is a Sound Practice to prepare a Baseline Documentation Report (BDR) and refer to it in every easement. The purpose of the BDR is to establish for the record the condition of the property at the time the easement is given. It typically consists of an ecological assessment, including inventories of any attributes relevant to the easement terms, such as soils, vegetation and wildlife; hydrologic functions; and human uses of the property. The documentation draws on maps, photos and other tools to describe the state of the land when the easement is granted. It also specifically describes the condition of the features affected by each restriction in the easement, each of which should be documented. This will ensure that any change that is not permitted will have a baseline to be specifically measured against.</p> <p>Sometimes, easements contain a BDR attached as an exhibit to the registered easement. It is important, however, to refer within the text of the easement to any further or more complete BDR (which may also contain photographs) which the Easement Holder prepares but does not register against title.</p> <p>If the BDR cannot be completed by closing (due to seasonal weather conditions or other circumstances) the text should include a reference to a reasonable timeframe within which it should be completed. The text should set out the obligation of the Easement Holder to deliver a copy of the final BDR to the Landowner. The Easement Holder should strive to obtain the signature of the Landowner on this complete BDR. If the signature is not forthcoming, a letter should be sent asking the Landowner to review it and let the Easement Holder know of any objections to it.</p> <p>In Quebec, it is not uncommon to have the parties sign each map, survey or photograph of the property within the BDR. This is seen to add additional accountability for the accuracy of these exhibits.</p> <p>See also Section II.C of this table.</p> |

## II. FUNDAMENTAL COMPONENTS OF A CONSERVATION EASEMENT PROGRAM

### A. Strategic Program Design

| <i>Objective</i>  | <i>Sound Practices</i>   | <i>Performance Measures</i>   | <i>Emerging or Enhanced Practices</i>  | <i>Performance Measures</i>   |
|---|--|---|--|---|
| The Easement Holder implements its mission in the design and execution of its conservation easements. | 1. The Easement Holder uses specific criteria to choose projects, and is not merely opportunistic in its acquisitions. | Easements acquired are consistent with and fulfill acquisition criteria.  | 1. The Easement Holder has a strategic plan that identifies focus areas, either ecological, geographical, or both, for easement acquisition. | Easements acquired are consistent with and fulfill goals of the strategic plan.   |
|   | 2. The acquisition criteria are periodically reviewed and re-evaluated.  | Feedback is gathered from the various performance measurements in this table, evaluated, and used to determine future strategic directions. | 2. The Strategic Plan is periodically reviewed and revised in a process of continuous improvement.   | Feedback is gathered from the various performance measurements in this table, evaluated, and used to determine future strategic directions. |

## B. Landowner – Easement Holder Relationship

| <i>Objective</i>  | <i>Sound Practices</i>   | <i>Performance Measures</i>   | <i>Emerging or Enhanced Practices</i>   | <i>Performance Measures</i>  |
|---|--|---|---|--|
| The Easement Holder creates and maintains a strong relationship with landowners of easement properties. | 1. At the onset of easement negotiations with the landowner, the Easement Holder provides the landowner with a clear explanation of the conservation easement process and mutual expectations and obligations, including any potential request for contributions to a stewardship endowment. Any written materials provided by Easement Holder carefully avoid statements that could conflict with provisions of future easement document. | Easement Holder creates a written record of this process. For instance, a landowner’s signed letter of intent includes an acknowledgement of the process and notes the mutual obligations and expectations. | 1. In addition, the Easement Holder provides the landowner a written summary of its conservation easement program, policies and practices to ensure that mutual expectations and obligations are understood.  | Landowner receives written summary.  |
|   | 2. During negotiations, the Easement Holder continues open communications with the landowner and clearly explains the restrictions that are being negotiated as well as how they will be monitored and enforced. Landowner obtains independent legal and tax advice during these negotiations.   | Easement Holder logs contacts with landowner, keeps notes on file, and asks in writing if the landowner has any questions specifically in regard to the restrictions, monitoring and enforcement.           | 2. Same as Sound Practice.  | Same as Sound Practice.  |
|   | 3. The Easement Holder maintains regular contact with the landowner over time.   | After closing, landowner is contacted at minimum once/year, during monitoring.  | 3. The Easement Holder continues to build a positive relationship through the annual monitoring process and other organizational communications, such as a regular newsletter and a point person designated by the Easement Holder to respond to inquiries. | After closing, landowner continues to receive supplemental information from Easement Holder. |

| <i>Objective</i> | <i>Sound Practices</i>  | <i>Performance Measures</i>                                  | <i>Emerging or Enhanced Practices</i>   | <i>Performance Measures</i>  |
|------------------|---|--|---|--|
|                  | 4. This process is adapted to relationship building with succeeding landowners: the Easement Holder provides the new landowner with a copy of the easement, and Baseline Documentation Report if requested, and invites him/her to discuss the contents of those documents and any previous monitoring reports. | Additional landowners are contacted and process is repeated. | 4. In addition, a system is in place to track land sales and identify succeeding landowners. Such a system might include notice of transfers from landowners if provisions are included for such notice within the easement, or a periodic title search to identify transfers from landowners who do not notify easement holders or due to the death of the owner. (see also Section I.C of this table) | Easement Holder possesses records of land sales and contacts new landowners within two months of such sales. |

### C. Ensuring Sound Transactions

| <i>Objective</i>   | <i>Sound Practices</i>   | <i>Performance Measures</i>   | <i>Emerging or Enhanced Practices</i>  | <i>Performance Measures</i>  |
|--|--|---|--|--|
| The Easement Holder carries out a thorough process of due diligence in its conservation easement transactions. | 1. Easement Holder conducts a site inspection and investigates the land use history, determines property boundaries, and assesses the property's natural and other attributes.   | Easement Holder documents the site inspection and notes any reasons for concern or follow-up.                 | 1. Same as Sound Practice.   |  |
|  | 2. Easement Holder conducts a thorough investigation of title to the property to ensure that it is aware of all claims to title and any exceptions or defects to title.  | A title report or extract of title documents any exceptions to title and all claims to title of the property. | 2. A due diligence policy sets parameters to determine how and whether to proceed in the face of certain title exceptions.   | A due diligence policy is adopted and followed regularly.          |
|  | 3. Easement Holder follows a comprehensive due diligence screening process for determining whether it is necessary to conduct inquiries into environmental contamination on the easement property.   | An environmental assessment is performed when the Easement Holder determines it is necessary.                 | 3. A written Environmental Assessment policy outlines a complete set of criteria to determine whether to proceed with Environmental Assessments on easement acquisitions.  | Environmental Assessment policy is adopted and followed regularly. |
|  | 4. When a Landowner asks an Easement Holder to provide a tax receipt for an easement donation (or partial donation), the Easement Holder commissions an appraisal to determine the fair market value of the property, the easement, and any gift of value made to the Easement Holder. | An appraisal is on file for every tax receipt issued.   | 4. Easement Holder has a written policy on using appraisals to value easements. Such a policy should deal with issues such as the accounting of increased value to neighbouring properties owned by the same parties as the easement being appraised, and ensuring that the appraisal accounts for all of the specific restrictions and reserved rights. | An appraisal policy is adopted and followed regularly.             |
|  | 5. Appraisers are certified by the appropriate provincial authority, are AACI approved, and have relevant experience in conservation easement appraising methods.  | Appraiser's qualifications are contained in each appraisal on file.   | 5. Same as Sound Practice.   |  |

| <i>Objective</i> | <i>Sound Practices</i>   | <i>Performance Measures</i>   | <i>Emerging or Enhanced Practices</i>   | <i>Performance Measures</i>  |
|------------------|--|---|---|--|
|                  | 6. When a Landowner wants to designate a donated easement as an ecological gift, the Easement Holder works with the Landowner and appraiser to meet the valuation requirements of the Ecological Gifts Program, for the specific type of gift being considered. The Easement Holder's role is to provide technical assistance; it is careful not to act as the Landowner's agent in applying for Ecological Gift status, and acts on its own behalf.   | Requirements of the Ecological Gifts Program are met for any easement donation received by the Easement Holder. | 6. If a Landowner does not decide to enter the Ecological Gifts program, the Easement Holder still keeps a written record of its evaluation of the fair market value of the property, given that the Landowner can enter the Ecological Gifts program up the three years after the easement is donated. | Written records regarding the easement property's value are kept on file (e.g. its sales history, comparable sales, etc.). |
|                  | 7. Easement Holder uses a consistent methodology to write a Baseline Documentation Report (BDR) for every easement. The methodology ensures that the BDR accurately reflects the conditions of the land at closing and it measures key indicators based on conservation targets, as detailed above in Section I.F of this table.   | Easement Holder develops a BDR outline/methodology from which all future BDRs are based.                        | 7. To ensure the consistent quality of Baseline Documentation, the Easement Holder has created or adapted a standard template for its BDRs.   | Easement holder develops a standard template for its BDRs from which all future BDRs are based.                            |
|                  | 8. All Baseline Documentation Reports (BDRs) are incorporated by reference into the easement, whether or not they are completed by the time of closing. If closing is during seasonal conditions when accurate Baseline Documentation is not feasible, a deadline is set and the BDR is completed by that date. The complete BDR is either signed by both/all parties to the easement, or the Easement Holder delivers a copy to the Landowner with a letter asking for any objections. (See also above, Section I.F of this table). | A BDR is completed for all easements.   | 8. The complete BDR is signed by both/all parties to the easement. (See also above, Section I.F of this table).   | A BDR is completed for all easements and signed by both/all parties to the easement.                                       |

| <i>Objective</i> | <i>Sound Practices</i>  | <i>Performance Measures</i>   | <i>Emerging or Enhanced Practices</i> | <i>Performance Measures</i> |
|------------------|---|---|---------------------------------------|-----------------------------|
|                  | 9. Every easement is approved by the Easement Holder's Board of Directors, or by a committee designated for this function by the Board. | All easements are presented to the Board of Directors or its designated committee for its approval. | 9. Same as Sound Practice.            |                             |

## D. Legal Review of Easements

| <i>Objective</i>   | <i>Sound Practices</i>  | <i>Performance Measures</i>  | <i>Emerging or Enhanced Practices</i>  | <i>Performance Measures</i>  |
|--|---|--|--|--|
| The Easement Holder creates legally enforceable, defensible easements. | 1. The Easement Holder uses a model easement that has been drafted by a lawyer experienced in relevant conservation, tax and real estate law. The Easement Holder’s lawyer periodically researches changes in practices and legislation and updates the template. | Review of the easement template is conducted regularly, at minimum every 1 - 3 years or whenever new easement legislation or legal precedents are created. | 1. Same as Sound Practice.   |  |
|  | 2. The Easement Holder’s model easement contains all of the “Sound Practices” described in Section I of this document.  | Model easement is reviewed to determine presence of these provisions.  | 2. In addition, the Easement Holder’s model easement contains all applicable “Emerging or Enhanced Practices” described in Section I of this document. | Model easement is reviewed to determine presence of these provisions.                            |
|  | 3. All easements (including attachments) are reviewed by a lawyer experienced in relevant conservation, tax and real estate law, preferably outside counsel when the easement is unusually complex or deals with specialized areas of the law.                    | Every easement goes through a legal review before being executed.  | 3. Same as Sound Practice.   |  |
|  | 4. The Easement Holder recommends in writing that the landowner seek independent tax and legal advice from a lawyer and/or tax professional on the easement agreement before signing.   | The Easement Holder creates a written record of this advice, either a letter, an email or notes from a telephone call.                                     | 4. The Easement Holder asks that the Landowner affirm that they obtained independent tax and legal advice.   | Easement contains a statement confirming that landowners have obtained independent legal advice. |

## E. Easement Stewardship

| <i>Objective</i>   | <i>Sound Practices</i>   | <i>Performance Measures</i>  | <i>Emerging or Enhanced Practices</i>   | <i>Performance Measures</i>   |
|--|--|--|---|---|
| The Easement Holder monitors compliance with easement terms regularly and effectively. | 1. The Easement Holder has created or adapted a standard monitoring form. Easement Holder fully documents each monitoring activity through the use of the standard form, using observations, photographs, and maps, and other necessary means. Standard forms should include, at minimum, basic site and contact information including date(s) of visit; report on landowner meeting; observations of current land uses, changes to the land, and management problems; and risk assessments and recommendations for any necessary further actions. | Monitoring reports are completed within one month of site visits; a copy should be provided to the landowner and a copy kept on file with the easement holder. | 1. Standard monitoring form has been adapted to the particular provisions of each easement. Tailored forms typically include maps of the easement, a list of the restrictions and reserved rights in the easement, specific conservation target species and ecological communities, and lists of species observed on property, along with the items in the standard form. | Monitoring form is created for each easement preferably before registration or immediately after registration with landowner's input.<br><br>Easement Holder documents each monitoring activity using the form tailored to the particular easement. |
|  | 2. The Easement Holder monitors the property on an annual basis at a minimum. Monitoring occurs in partnership with the Landowner and results are shared with the Landowner.   | For each easement, at least one monitoring report is filed each year.  | 2. In addition, the Easement Holder has a written policy stating its commitment to and procedures for monitoring.   | Monitoring policy objectives inform and are incorporated into the standard monitoring form.   |
|  | 3. Monitoring reports refer to and follow up on important issues, information or data presented in the Baseline Documentation Report or in previous monitoring reports.  | Monitoring reports are periodically reviewed or audited for consistency with other documentation.  | 3. Staff/volunteer monitors review and fully understand the easement, Baseline Documentation Report and previous monitoring reports, before undertaking annual monitoring.  | Monitoring reports follow up on issues previously highlighted.  |
|  | 4. The Easement Holder monitors the Landowner's legal compliance with easement terms.  | Legal compliance is monitored once per year at minimum.  | 4. The Easement Holder also occasionally monitors ecological measurements as appropriate to the conservation targets.   | Ecological measurements are taken as often as is appropriate to the conservation targets.   |
|  | 5. The Easement Holder's staff/volunteers are provided with training in monitoring.  | Easement Holder tracks annual training expenditures to ensure adequacy of training.  | 5. Same as Sound Practice   |   |

| <i>Objective</i> | <i>Sound Practices</i>  | <i>Performance Measures</i>  | <i>Emerging or Enhanced Practices</i>   | <i>Performance Measures</i>  |
|------------------|---|--|---|--|
|                  | 6. The Easement Holder has a written Amendments Policy, which states the criteria by which it will evaluate requests for amendments and guides its actions when a request for an amendment arises. It should include EcoGift Program requirements for approvals of amendments. (see also Section I.E.6 of this table)       | An Amendment Policy is adopted, and contains a mandate that any amendment to an easement not weaken its terms. | 6. Same as Sound Practice.  |  |
|                  | 7. The Easement Holder has a written easement Violations Policy which includes a process for resolving conflicts with Landowners, and guides decision-making and course of action, follow-up and resolution of violations, auditing and record-keeping. It should include any relevant requirements of the EcoGift Program. | In the event of a violation, the process is followed and documented.   | 7. Easement Holder tracks all known violations, even if it does not choose to take legal action to stop the violation from occurring. | The Easement Holder generates a written record by, for example, writing an estoppel certificate acknowledging breach, any remedy in place, spelling out why no further enforcement action is being taken, and clarifying that this does not allow any further or future breach to occur. |

## F. Financial Capacity and Management

| <i>Objective</i>  | <i>Sound Practices</i>   | <i>Performance Measures</i>  | <i>Emerging or Enhanced Practices</i>   | <i>Performance Measures</i>  |
|---|--|--|---|--|
| The Easement Holder has the financial capacity to monitor and enforce easement terms, and enforces such terms consistently and effectively. | <p>1. For each conservation easement, the Easement Holder evaluates its capacity to monitor and enforce easement terms in perpetuity, and does not accept easements that it cannot monitor effectively.</p> <p>It estimates the annual budget required for each easement for long-term easement stewardship, and determines a strategy for meeting the budget. Typically a “stewardship reserve fund” is established to generate a dependable source of revenue.</p> | The Easement Holder reconciles its actual means to fulfill its stewardship obligations with the budget it estimated. For instance, a cash endowment is raised to capitalize a stewardship reserve fund (\$10,000 would be a minimum amount necessary to generate a very basic annual budget), or the Easement Holder can quantify the equivalent (\$500/year) in budgeted operating funds, volunteer hours and in-kind material donations towards annual stewardship expenditures for each easement. | <p>1. The Easement Holder has a consistent methodology, typically a budget form, to estimate long term stewardship and enforcement costs, including staff time both in office and in the field, materials, travel, and potential legal costs.</p> <p>This budgeting form should break down both short term costs, out of pocket in the first year after the transaction closes, and long term costs, such as training time for volunteer monitors, staff time for documentation of monitoring, etc...</p> | Same as Sound Practice.  |
|   | <p>2. If stewardship reserve funds are not raised by the time of closing, there is a plan to do so by a certain date.</p>  | Stewardship reserve funds are raised within one year of each acquisition.  | <p>2. The Easement Holder tracks stewardship, monitoring and enforcement costs, and periodically evaluates the adequacy of its conservation easement stewardship funds.</p>   | Stewardship staff logs time spent on easement stewardship, monitoring and enforcement and assign any costs associated with individual easements and/or easement program to appropriate easements and/or easement program as a whole. |
|   | <p>3. Easement Holder raises funding for enforcement of easement terms (“legal defence funds”). Legal defence funds should grow to reflect the size and diversity of the conservation easement program.</p>  | Legal defence funds are available and grow as necessary with the number of easements the Easement Holder accepts.  | <p>3. Same as Sound Practice.</p>   |  |

| <i>Objective</i> | <i>Sound Practices</i>  | <i>Performance Measures</i>  | <i>Emerging or Enhanced Practices</i>  | <i>Performance Measures</i>  |
|------------------|---|--|--|--|
|                  | <p>4. An investment policy has been established to preserve reserve/defence fund(s) principal while growing the funds.</p> <p>Easement holders obtain legal and tax advice periodically to ensure their investments and expenditures meet the requirements of the <i>Income Tax Act</i> and other relevant legislation.</p> | <p>Investment policies typically contain specific return goals for either money managers or controllers to meet. Returns should be evaluated over time against these goals to determine adequacy of performance.</p> | <p>4. Large funds are professionally managed. Investment policies have been established to set return goals and management guidelines.</p> | <p>Goals are typically set as an average of 3-5 years' returns, to account for market fluctuation. For large funds, a long term return of approximately 7% can be expected; less for smaller funds. Capping annual expenditures at between 4-6% of fund principal is an accepted current practice to preserve principal and grow the fund. These guidelines may change over time, and depend on market conditions.</p> |
|                  | <p>5. The Easement Holder places its reserve/defence fund(s) in an <i>internally</i> restricted account, or one whose access is governed by rules set internally.</p>   | <p>Internal governing processes determine when and how to use the funding.</p>   | <p>5. Same as Sound Practice.</p>  |  |

## G. Record Keeping

| <i>Objective</i>  | <i>Sound Practices</i>  | <i>Performance Measures</i>  | <i>Emerging or Enhanced Practices</i>   | <i>Performance Measures</i>  |
|---|---|--|---|--|
| The Easement Holder's easement program is supported by a methodical and complete record keeping system. | 1. The Easement Holder records are maintained in accordance with any charitable and applicable laws.  | Relevant reporting forms are completed.  | 1. The Easement Holder has a written record keeping policy to ensure a consistent, well-organized method of record keeping – including creation, collection, retention, storage and disposal of records.                                    | Policy is in place and is used to guide the design of the system.  |
|   | 2. The Easement Holder includes all types of documentation in its record keeping system, including legal documents, maps, photos, letters of correspondence, emails, and reports (both hard copy and digital), as well as written records of verbal conversations.  | A system is in place to organize and file all such documentation. It is regularly used and updated.                                    | 2. The Easement Holder has a centrally accessible database to organize and store important property related information. The Easement Holder has a secure storage system for digital files, including a regularly maintained backup system. | Staff can quickly and easily access property information electronically; information is regularly updated and current. |
|   | 3. The Easement Holder maintains separate systems for working files and permanent files. Permanent files, or original, irreplaceable documents essential to the defence of each transaction (such as deeds, legal agreements, critical correspondence, baseline documentation reports and appraisals) are stored in a location safe from fires, floods, and other damage. Copies of all such records are kept in a separate, easily accessible location as working files. | There is a system for maintaining both the Working and Permanent filing systems, and staff time is used for its maintenance regularly. | 3. Same as Sound Practice.  |  |

### III. FUNDAMENTAL ORGANIZATIONAL PROCESSES FOR A CONSERVATION EASEMENT PROGRAM

This section is a concise summary of features of a conservation organization’s overall practices which are important to ensure the integrity and continuity of its conservation easement program. A whole set of standards exist at several provincial associations of land trusts, the Standards and Practices, which were adapted from the Land Trust Alliance’s document of the same name.

These Standards and Practices have been updated recently in the US, and are currently being adapted for use in Canada. These S&Ps will be an important, ongoing guide to the conduct of Canadian land trusts. The following practices do not take the place of those S&Ps, but rather point out some of the most important among the overall organizational practices.

#### A. Compliance with Laws and High Ethical Standards

| <i>Objective</i>  | <i>Sound Practices</i>   | <i>Performance Measures</i>   | <i>Emerging or Enhanced Practices</i>  | <i>Performance Measures</i>  |
|---|--|---|--|--|
| The Easement Holder complies with all applicable laws and regulations, and operates in a manner that reflects well upon the land trust community. | 1. The Easement Holder has a clear understanding of all related federal/provincial laws and how they pertain to the organization in terms of its ability and responsibility to hold conservation easements under the relevant provincial or territorial legislation and the federal Income Tax Act, including the provisions relating to ecological gifts. | Reporting requirements to these agencies are met; all relevant laws are identified and documented.  | 1. Easement Holder staff and executives engage in periodic training to learn about changes in law and regulations. | All Easement Holder staff and executives involved with conservation easement negotiation, drafting, stewardship and enforcement have an understanding of the relevant legislation and its relation to their position and activities. |
|   | 2. The Easement Holder conducts its affairs according to high ethical standards, with attention to the impacts its actions have on the land trust community and the community in which it operates.  | The Easement Holder adheres to the Standards and Practices approved by provincial land trust alliance organizations; or if not located in one of the provinces covered by these associations, adheres to the same Standards and Practices as a matter of organizational policy. |  | 2. The Easement Holder has adopted its own code of conduct, and makes this information available to the public.  |

## B. Conflict of Interest

| <i>Objective</i>  | <i>Sound Practices</i>  | <i>Performance Measures</i>   | <i>Emerging or Enhanced Practices</i>   | <i>Performance Measures</i>     |
|---|---|---|---|---------------------------------|
| The Easement Holder avoids the appearance or reality of conflicts of interest between its personnel (Board, staff and volunteers) and the fulfillment of its mission. | 1. Transactions with insiders are managed appropriately to avoid or mitigate conflicts of interest. (Insiders may be board, staff, substantial contributors or those who have an ability to influence decisions of the organization and those with access to information not available to the general public.) Easement Holder obtains Board evaluation and approval of transactions involving conflicts of interest. | When entering into transactions where there is a possible conflict of interest, such as accepting conservation easement donations from insiders or entering into a contract for services relating to such an acquisition, the Easement Holder obtains an appraisal from a qualified independent appraiser with conservation real estate experience to determine the value of any transaction, and this value is reflected in any donation receipt issued. | 1. The Easement Holder adopts and follows a written conflict of interest policy encompassing at least the following three features: disclosure of information, independent third party evaluation of particular transactions, and Board approval of transactions involving conflicts of interest. | Policy is adopted and followed. |

## C. Budgeting

| <i>Objective</i>   | <i>Sound Practices</i>  | <i>Performance Measures</i>   | <i>Emerging or Enhanced Practices</i>   | <i>Performance Measures</i>   |
|--|---|---|---|---|
| The Easement Holder has adequate resources to implement its conservation easement program. | 1. The Easement Holder prepares an annual budget sufficient for its conservation easement program to manage its current responsibilities and continues to expand as needed. | Conservation easement budget should be sufficient to implement Sound Practices in this table. | 1. The conservation easement budget is guided by a written long-range fundraising plan. | Goals for long-range fundraising plan should be sufficient to implement Emerging or Enhanced Practices in this table. |

## D. Human Resources

| <i>Objective</i>  | <i>Sound Practices</i>   | <i>Performance Measures</i>   | <i>Emerging or Enhanced Practices</i>  | <i>Performance Measures</i>   |
|---|--|---|--|---|
| The Easement Holder's staff, volunteers and Board members are effective in their positions. | 1. The Easement Holder provides adequate training for new staff and volunteers (including Board Members) on procedures and practices pertaining to the conservation easement program. Such training is also provided to current staff, volunteers and Board members, especially when new procedures and practices are being established. | Training budgets are tracked to ensure that adequate funding is being allocated to training, and that the allocation increases with increases in staff. | 1. Staff and volunteers (including Board Members) have written goals or job descriptions and periodic performance reviews. | Minimum annual performance reviews for each staff or Board member and certain regular volunteers. |