

# Standards and Practices

## STEWARDSHIP

### Compiled Guidance

This document compiles the Land Trust Alliance’s guidance for the accreditation indicator elements in the **Stewardship** category. With background information on and explanations for each practice element, these narratives provide guidance to help land trusts implement the practices and understand the requirements for accreditation.

## STEWARDSHIP

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| <p><b>11B3.</b> When there are significant changes to the land or the conservation easement (such as a result of an amendment or the exercise of a permitted right), document those changes in an appropriate manner, such as through monitoring reports, a baseline supplement or current conditions report</p> <p><b>11C2.</b> Monitor each conservation easement property at least once per calendar year (a) If the land trust uses aerial monitoring, conduct on-the-ground monitoring at least once every five years, (b) Promptly document the annual monitoring activities for each conservation easement</p> <p><b>11E1.</b> Adopt a written policy and develop written procedures for documenting and responding to potential conservation easement violations</p> <p><b>11E2.</b> Investigate potential violations in a timely manner and promptly document all actions taken</p> <p><b>11F3.</b> Maintain a permanent record of all notices, approvals, denials, interpretations and the exercise of any significant permitted rights</p> <p><b>11H1.</b> Adopt and follow a written policy or procedure addressing conservation easement amendments that is consistent with the Land Trust Alliance Amendment Principles</p> <p><b>11J1.</b> In the rare case that it is necessary to extinguish a conservation easement, in whole or in part, (a) Follow the terms of the conservation easement with respect to taking appropriate action, and obtain judicial or regulatory review</p> | <p>when required by law or specified in the easement deed, (b) Ensure there is no private inurement or impermissible private benefit, (c) Take steps to avoid or mitigate harm to conservation values and/or use any proceeds in a manner consistent with the conservation easement deed, (d) Consider the land trust’s actions in the context of its reputation and the impact on the land conservation community at large</p> <p><b>12B1.</b> Develop a written land management plan for each conservation property within 12 months after acquiring the land to: (a) Identify the property’s conservation values, including any significant cultural and natural features or those that have significant community value, (b) Identify the overall management goals for the property, (c) Identify activities to achieve the goals and to reduce any risks or threats to the conservation values, (d) Specify the uses that are appropriate for the property, in keeping with the property’s conservation values, any restrictions and donor or funder requirements</p> <p><b>12C2.</b> Inspect properties at least once per calendar year for potential management problems and promptly document the inspection</p> <p><b>12C3.</b> Address management problems, including encroachments, trespass and other ownership challenges, in an appropriate and timely manner and document the actions taken</p> |
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# Standards and Practices

## STANDARD 11 CONSERVATION EASEMENT STEWARDSHIP

### B. Baseline Documentation Report

- 3. When there are significant changes to the land or the conservation easement (such as a result of an amendment or the exercise of a permitted right), document those changes in an appropriate manner, such as through monitoring reports, a baseline supplement or current conditions report

Accreditation indicator elements located at [www.landtrustaccreditation.org](http://www.landtrustaccreditation.org)

#### WHEN AND WHY YOU SHOULD SUPPLEMENT A BASELINE DOCUMENTATION REPORT

Once completed and signed by the land trust and landowner, land trust personnel cannot alter the original baseline report, but they can and should correct mistakes and provide supplemental materials and updates to create a complete baseline documentation file. A complete baseline documentation file will thoroughly document the condition of the property as of the date of the easement and then reflect all applicable changes to the land or conservation easement since that time. Documenting these changes and having a complete baseline documentation file is essential to ensure the land trust has accurate information on the property's condition for monitoring and enforcement.

The land trust should document when there are significant changes to the land covered by the conservation easement, including the following:

- Natural changes, such as those caused by wildfires, flood or earth movement

- Human-made changes, including:
  - The exercise of significant permitted rights in the conservation easement (such as the right to build a new home or a new road or to divide the property)
  - Significant restoration or enhancement actions
  - The removal or modification of structures that existed at the time of the original baseline report
- Changes in land ownership or land division to reflect the new ownership and contact information for the new owner(s)

The land trust should also create documentation to reflect the condition of the property at the time of an easement amendment if the amendment changes reserved rights or any other easement terms that may potentially affect the information documented in the original baseline documentation report.


- For example, if an amendment increases restrictions along a riparian corridor to prevent disturbance to vegetation, the land trust should document the condition of the corridor at the time of the amendment.
- If an amendment modifies the right to subdivide the property, resulting in new boundaries of the divided lots, then survey plans, photos or other documentation of the new boundaries are important.
- If an amendment is the result of an easement violation settlement, the land trust should document any changes on the ground from those existing at the time of the original easement. For example, if a violation resolution results in formerly prohibited structures being allowed to remain on the easement property in exchange for additional land being added as mitigation, the location of those structures should be shown on maps, plans and so forth, as well as the boundaries, conservation values and condition of the newly added area.
- An amendment that protects a new suite of conservation values or adds additional land to the easement area should also cause documentation of the conservation values and new land. This documentation may be best covered in a current conditions report or baseline supplement (see below). In these instances, the owner should sign the documentation in same manner as the original baseline.

For more information on conservation easement amendments, see [Practice 11H](#).

## HOW TO DOCUMENT CHANGES

There are three main ways to document significant changes to the land or conservation easement in order to build a complete baseline documentation file. Ultimately, the form of documentation this updated information takes is not as important as the fact that the land trust creates it.

Regardless of the form, the documentation of change should include the date of the documentation, a written description of the change and relevant photographs, maps or videos.

 For accreditation, a land trust needs to document a significant change to the land covered by a conservation easement or a change to the conservation easement. The documentation needs to include the date, written descriptions and photographs and/or maps.

- *Monitoring reports.* Some land trusts view their annual monitoring reports, which they maintain in their stewardship project file, as the official update. This type of documentation is best used for changes in ownership, updates to contact information, the execution of permitted rights (such as the right to erect a building) or removal of structures.
- *Supplemental baseline report or update.* Another approach is to prepare a more formal supplement to the baseline documentation to reflect changes to the land over time, attach the supplement to the original baseline and store all supplements in accordance with the land trust's baseline storage or recordkeeping policy. Land trusts use baseline supplements most often for significant changes to the property caused by an encroachment, amendment or dispute resolution process.
- *Current conditions report.* In contrast, a current conditions report is a separate report prepared by the land trust that documents the condition of the property at the time of the report. A land trust most often creates a current conditions report if there was no original baseline documentation report or sometimes when the property transfers to a new owner. The contents of a current conditions report should be the same as an original baseline documentation report (see [Practice 11B1](#)).

As with the original baseline, the land trust should attempt to get the current landowner's signature on a supplemental baseline report or current conditions report.

At a minimum, the land trust must ensure that the monitoring reports, or any other documents reflecting the current condition of the property, address all of the changes to the land discussed above. The land trust must also store such reports or other documents in accordance with established baseline storage policies and procedures (see [Practice 9G](#)). In other words, the land trust must tie these monitoring reports or other documents to the baseline and maintain them as if they were part of an original report. They should not be stored in a separate, unsecured location.



## STANDARD 11. CONSERVATION EASEMENT STEWARDSHIP

### C. Conservation Easement Monitoring

- ▲ 2. Monitor each conservation easement property at least once per calendar year
  - ▲ a. If the land trust uses aerial monitoring, conduct on-the-ground monitoring at least once every five years
  - ▲ b. Promptly document the annual monitoring activities for each conservation easement

Accreditation indicator elements located at [www.landtrustaccreditation.org](http://www.landtrustaccreditation.org)

#### BACKGROUND

A land trust should monitor its easements at least once per calendar year. Monitoring helps a land trust develop a relationship with the landowner, helps discover changes in land ownership, enables it to see if the easement is effective, helps uncover violations, saves time and money on enforcement actions, and establishes a record in case of court action. Annual monitoring routinely reminds the landowner of the easement and provides a means for annual landowner contact. With annual monitoring, the land trust can promptly document any changes in the property's condition relative to the easement. All monitoring activities, including informal ones (for example, a drive-by or casual observations not done as part of a formal monitoring), should be documented to build a record for future monitoring and in case the land trust must address a violation. The land trust should complete its monitoring report promptly after the monitoring visit. Critical elements of the annual monitoring report include the inspection date, name of the property inspected, who did the inspection, observations related to the property's condition and conservation values and observations related to potential easement violations. Some easements with particularly sensitive conditions or on land where a landowner is performing management activities may require

monitoring more frequently than once a year. Land trusts use a combination of on-the-ground review, aerial observation, aerial imagery, satellite and other methods in their annual monitoring.

## FREQUENCY

Land trusts should conduct inspections regularly, *at least once per calendar year*. If the land trust closed on a conservation easement at the end of one year, it needs to monitor the conservation easement by the end of the next year. (For example, if a conservation easement closed in October 2016, then the first monitoring visit must be before the end of 2017.) Violations that are discovered more than a year after commencement of the noncompliant activity may be more difficult to resolve or remediate. This does not necessarily mean the land trust does not have enforcement rights after a year. For more information on this issue, refer to state conservation easement enabling law and land trust counsel.

Sometimes more frequent regular monitoring is desirable, depending on the easement terms, the property's location and characteristics, the availability of monitors and monitoring method used, and the capacity of the land trust. For example, a land trust that accepts easements protecting water quality in an agricultural valley may need to monitor farm activities more frequently than once per year. If it chooses to monitor more frequently, the land trust must have commensurate capacity.

Certain circumstances warrant occasional monitoring outside of the regular monitoring schedule, such as:

- A landowner is executing a reserved right that may affect the conservation values if not conducted in accordance with the easement terms. For example, if a landowner is executing a reserved right to build a residence, then the land trust may want to monitor the property during construction to check for compliance with specific terms of the reserved right. Or, if a landowner is harvesting timber on a working forest easement property, then the land trust may need to monitor the harvest to ensure the logger implements best forest management practices.
- There exists greater than average potential for a violation. For example, easements neighboring residential developments have a greater potential to be violated by trespassers.
- The land has transferred to new owners.
- A significant land alteration project, such as construction of a building or excavation, is occurring on an adjacent property.

- Collection of biological or ecological data is needed in support of the easement terms.
- A landowner requests a statement of compliance (also referred to as an *estoppel* or *compliance certificate*), perhaps before a transfer of ownership.

If a land trust conducts occasional monitoring for a specific reason, then it should clarify in the monitoring documentation that the monitoring was outside of the regular monitoring protocol. Regular monitoring involves an overall inspection of the property and addresses all easement terms, while occasional monitoring looks at a specific circumstance and addresses only the relevant easement clauses. Likewise, documentation of a monitoring visit conducted to address a landowner's request for a statement of compliance should be so noted.

∞ For accreditation, a land trust must monitor all conservation easements once per calendar year. This includes any conservation easement on a property owned by a public agency or another land trust or any conservation easement on a mitigation property, even if the mitigation project is incomplete.

∞ For accreditation, a land trust must meet these annual monitoring requirements over the entire accredited term. If a land trust is applying for first-time accreditation, it needs to document that it has monitored its conservation easements for three years prior to the pre-application submittal.

Accreditation does allow for some modest variations to calendar year monitoring if a land trust routinely monitors its conservation easements at year-end and/or within a specific season that results in monitoring falling outside the calendar year. For example, the Commission would accept the following pattern for a renewal applicant, even though the calendar-year 2015 visit occurred in 2016: December 2013, December 2014, January 2016, December 2016 and December 2017.

## SCHEDULING MONITORING

Like easement terms, monitoring schedules are tailored to the requirements of the landowner, the land trust and the type of easement property. To determine the best time to monitor, consider:

- Provisions of the conservation easement — are there any terms that need particular timing for the inspection, such as restrictions on specific agricultural practices or terms involving specific management for rare species?
- Terms of the inspection clause of the easement, such as limits on times of access to the property or requirements about contacting the landowner prior to monitoring.
- Physical factors, such as seasons and weather.
- Safety concerns, such as hunting season.



- Landowners' schedules.
- Land trust scheduling requirements, as may be outlined in the monitoring policy (see [Practice 11C1](#)).

To get the most from a site inspection, monitoring should occur when the property is most visible and accessible, and ideally when the landowners are most available. For example, monitoring in the winter months in the northern United States may not be feasible given snow cover, or areas of the country prone to mudslides may have road closures during spring months or periods of heavy rain. For easements protecting critical habitat for rare, threatened or endangered species, ground monitoring may be timed to observe habitat, such as when rare plants are in bloom or when birds are nesting or present. Land trusts may need to work around landowners' schedules, such as farmers' planting times or second homeowners' availability.

As organizations establish annual work plans, it is important to include the monitoring schedule. To ensure adequate time is allotted, land trusts may estimate total time by multiplying the average time for one inspection by the number of easements. Formally scheduling the monitoring will help ensure that it is completed.

## MONITORING METHODS

Land trusts protect a variety of properties and waterbodies in diverse landscapes across the country. Consequently, monitoring methods vary. For some land trusts, the geography and topography of the region dictates the monitoring method. For others, ancillary goals of the monitoring program, such as creating an opportunity to work closely with the landowner toward improving resource management, shape the monitoring method. In any case, land trusts should select monitoring methods that match the type of land and resources that they are protecting, the easement terms and the capacity of the land trust. Regardless of the method, land trusts must maintain documentation of the monitoring event. Some common monitoring methods include:

- *On foot.* This method is most common for smaller properties that are relatively accessible and can be walked within a few hours. This method easily allows the landowner to accompany the monitor on the visit. It is the best choice for easements that need close visual inspection. It may be more costly in terms of time and money than some other methods, particularly if using staff or consultants.
- *Automobile.* This method is good for monitoring properties that are bisected or surrounded by public roads or have interior roads in good condition. It is a good choice to minimize time spent on larger properties that are highly visible from the car (such as open fields), but

not for properties that require a closer visual inspection. Many land trusts also use informal drive-by visits to keep tabs on easement properties between formal monitoring visits.

- *Recreational vehicle.* Using recreational vehicles is a great way to cover a lot of ground, provided there are accessible trails, access ways or open lands and the use of such vehicles will not conflict with the terms of the easement or damage ecological resources. However, this method may not be feasible for certain areas, such as wet or steep properties. There are costs associated with the use, upkeep and transport of these vehicles if owned by the land trust, and there are also safety and insurance considerations. Some landowners may have these vehicles available for use at their properties, or volunteers or consultants may own their own recreational vehicles, which may lower costs.
- *Horseback.* This method is an obvious and enjoyable way to monitor an equestrian or large ranch property or other types of properties that are suitable for horses. Riders should be experienced and take precautions to minimize the risk of injury. The Montana Land Reliance typically monitors by foot or vehicle, but if the stewards or the easement landowners have horses or all-terrain vehicles, they will sometimes ride them during monitoring visits.
- *Boat.* For easements that protect rivers, lakes, islands, shorelines, swamps or other waterbodies or their upland buffers, a canoe, kayak or other boat may be the best (or only) way to view significant portions of the property. Maine Coast Heritage Trust, which holds easements on islands, uses this method for some properties. If the entire property cannot be viewed by boat, additional monitoring is required. If a land trust must own and maintain kayaks, canoes or larger boats for monitoring, it should factor this expense into stewardship costs.
- *Aerial (airplane or helicopter).* Aerial flyovers are a great way to view easement properties or blocks of protected land, particularly if they are large, forested, remote or comprised of rigorous terrain. Aerial monitoring is not appropriate for all properties or to inspect certain types of restrictions covered by the conservation easement. However, aerial monitoring can save enormous time for a land trust, and volunteer pilot programs can keep the costs low. Land trusts may need to follow aerial monitoring with a ground visit to obtain a better visual inspection, to document changes on the property, to investigate a suspected violation and to meet with the landowner. At a minimum, land trusts should supplement aerial monitoring with on-the-ground monitoring at least once every five years. The land trust should also make sure its aerial photographs are verifiable to a specific date.

The Society for the Protection of New Hampshire Forests previously used aerial monitoring to inspect all of its properties. However, as the Society's roster grew to more than 500 easements, it became impractical to fly over all easements each year. The Society now has

an aerial monitoring protocol in which it contracts annually with an aerial imagery supplier to obtain up-to-date aerial images of all easement properties. Easement boundaries are superimposed on the imagery using GIS data, and then Society staff inspect the images to detect changes and potential violations. The Society documents its aerial monitoring by ensuring aerial photographs are verifiable to a specific date and provide sufficient information to monitor the properties (including easily identifiable boundaries and restrictions appropriate to aerial monitoring).

- *Remote sensing/satellite.* If a land trust is protecting exceptionally large properties on a landscape-scale, then satellite imaging is a good first step in the monitoring process. The land trust can compare the satellite images to property maps and older aerial photographs to note any changes that would require a follow-up visit (either by air or on the ground). Land trusts are cautioned not to rely solely on satellite images; other forms of monitoring must be used periodically to confirm interpretation of the images and compliance with easement terms.
- *Combination.* Land trusts may elect to use a combination of monitoring methods, based on property characteristics and available resources. For example, the Columbia Land Conservancy, a countywide, staffed land trust in New York, conducts aerial monitoring of all easement properties every year. A flight can usually cover all properties in one day. In addition to saving time, this method also is the most effective way to monitor the organization's larger, forested easements. The Conservancy also conducts ground monitoring on half of its properties each year, so that staff visit on the ground once every two years. The Vermont Land Trust also uses a combination of methods, including ground visits and the review of aerial images obtained from the Farm Service Agency and municipal tax-mapping authorities.

## CONDUCTING GROUND MONITORING

All monitoring programs must include some component of ground monitoring. This section describes how land trusts typically conduct a monitoring visit, from preparation through post-visit documentation and follow-up. Guidelines for monitoring should be contained in written policies or procedures (see [Practice 11C1](#)).

## Pre-Monitoring Preparations

### Inform the Landowner

Before the land trust conducts its easement monitoring, it should contact the landowner to provide notice of its monitoring plans, including the date and method of monitoring. If appropriate, the land trust may ask the landowner or another person, such as the property manager, to accompany the monitor during the visit. The land trust should follow any requirements contained in the easement, such as providing notice of the visit in writing, as well as any requirements of the land trust's monitoring policy or procedure (see [Practice 11C1](#)).

When calling or sending a letter to landowners about its monitoring plans, the land trust may also remind landowners to contact the land trust if they are planning any activities that require notification or approval (see [Practice 11F](#)). Some land trusts also send a questionnaire asking about the landowner's potential plans for the property over the coming year. Other land trusts take a more conversational approach and notify the landowners (and managers, as appropriate) of the monitoring visit by phone and inquire about future plans during the conversation.

### Review Files

To be efficient and effective, monitors must do their homework prior to the monitoring visit. This homework includes reviewing, as appropriate:

- Easement terms and subsequent amendments, waivers, clarifications and/or approvals
- The baseline documentation report and any updates or supplemental materials
- Previous monitoring reports
- Correspondence between the land trust and landowner, including notices and approvals
- Maps, including the easement map, survey or plat map and natural resource maps (soils, wetlands, topography) and aerial photographs
- Management plans (timber, agricultural, natural resource inventories)

### Field Supplies

What to bring for monitoring depends on the type of property and method of monitoring.

Following is a typical list of items that land trust monitors may need on inspection trips.

- Directions or location map
- Easement map and/or aerial or other maps that identify the property and depict any special use areas

- Monitoring form or checklist
- Copy of easement or summary of permitted and restricted uses
- Copy of baseline documentation (and updates, if applicable)
- Camera and batteries
- GPS unit, compass, binoculars, flagging tape and measuring tape or pole
- Survival gear, including water, food, insect repellent, cell phone, first-aid kit
- Foul weather gear, sleeping bag, space blanket, whistle (if monitoring large, remote properties or where conditions change with minimal warning)
- Special clothing, as applicable (for example, brightly colored safety vest during hunting season)

*Remember:* Any written materials or maps used in monitoring should be working copies, so originals are not damaged or lost.

Land trusts should carefully consider what easement-related materials are appropriate for the site visit and, if the landowner is to be present, whether any materials could cause potential problems. For example, suppose the monitor has a copy of the easement in hand when conducting a site visit with the landowner. The landowner asks whether a certain activity can take place on the property. The monitor might feel pressured to review the easement and provide an immediate answer. In fact, depending on the landowner's question and the role of the monitor within the land trust (staff, volunteer or consultant), they should take time to review the easement, defer the question to the appropriate staff person or even possibly speak with an attorney to confirm interpretation of a clause. If the monitor answers incorrectly during the visit, it will place the land trust in an awkward position and may strain the land trust–landowner relationship or reduce the landowner's confidence in the land trust.

Or suppose the monitor has a monitoring form in hand that includes a list of items on which the land trust hopes to partner with the landowner for better resource management. Perhaps, for example, the easement is silent on the matter of overgrazing, but the land trust wishes to note any signs of overgrazing and provide the landowner with information about proper grazing practices to encourage sounder resource management. If the landowner notices the form, they may question why overgrazing is relevant and feel the land trust is inappropriately intruding into their land management practices. Again, this would place the land trust in an awkward position and could strain the relationship.

## Safety

A monitor should take safety precautions as appropriate. At the very least, monitors should leave word about their whereabouts. If the landowner is at the property but not accompanying the monitor, the monitor usually should let the landowner know they are there. Bringing another person along on the visit may be advisable for large or remote properties, or when meeting difficult landowners and a witness to the inspection and conversation may be useful later. Monitors may also want to leave a sign or business card in their car window, notifying landowners and others about the monitor's presence on the property. Monitors should be prepared for the unexpected, including bad weather and difficulties with domestic animals or wildlife. Monitors should always leave a property immediately if they do not feel safe.

## The Monitoring Visit

### What to Monitor For

The conservation easement terms, baseline documentation report and prior monitoring forms are the documents that guide the monitor on what to look for during the monitoring visit. Focus monitoring on the easement's use restrictions and reserved rights: if buildings are prohibited, observe whether there is new construction; if mining is prohibited, observe whether the land surface is disturbed; if reserved rights have been exercised, document this fact; and so on. Some features that require particular attention include:

- Boundaries or other areas that are vulnerable to encroachment
- Roads and other access ways
- New trails or access points
- Flagging tape
- Areas of recent activity permitted by the easement
- Signs of disturbance (for example, excavation, vegetation distress, dumping, tree felling)
- Indicators of property conditions (for example, erosion, residual dry matter, invasive species, water quality)
- Activity in or around building areas (existing or reserved), if applicable
- Areas heavily used by landowners or by the public
- Streambanks and lakeshores, if restricted by the easement

In some instances, properties are so large that it is not feasible to monitor the entirety every year, so it is important to keep a record of which areas the land trust monitored to ensure it monitors other areas of the property on the next visit.

A land trust should monitor only for compliance with the easement terms. Although a land trust might notice other land management issues or concerns, it is important to maintain the distinction between easement issues and issues that are not within the purview of the land trust's responsibility. Before a land trust brings non-easement issues to a landowner's attention, it should consider why the issue matters to the land trust and how the landowner may receive the information. For example, a monitor may discover a deer-hunting stand in a tree that straddles the easement property boundary. The terms of the easement permit the stand, but the monitor suspects that a neighbor erected the structure, and the landowner is unaware that the neighbor is hunting on the property. In this instance, the landowner may be grateful to the land trust if the monitor mentions the deer stand, either because the landowner is distressed about the neighbor's trespass or because the landowner appreciates the land trust's concern.

Consider another scenario in which a monitor notices an abundance of noxious weeds on the protected property, but the easement does not require the landowner to minimize or eradicate the weeds. Suppose the monitor tells the landowner that he should address the problem. The landowner may be offended or upset that the monitor questioned his stewardship of the property and feel that the land trust overstepped its legal monitoring authority. In this case, a better approach may be simply to ask the landowner whether he would like some information on controlling invasive species.

Decisions about what to say and how to say it are judgment calls based on the land trust's relationship with the landowner. Land trusts also should carefully consider what observations are in writing on the monitoring form, particularly if the land trust requires the landowner to review and sign the form.

### Documentation during Monitoring

A primary purpose of monitoring is to observe and document changes in the condition of the easement property that are relevant to the easement terms. If there is doubt about what changes are relevant to easement terms, err on the side of documentation while in the field and determine the relevance later, back in the office. In general, the monitor should document new activities and changes, whether due to human activity (construction, new land use and so on) or natural causes (fire, severe wind damage, flooding). Documentation generally includes taking photographs and keeping a record of photo points on a map for future reference or for any necessary monitoring

follow-up. It may also include taking measurements, water samples or other types of analysis implied by the easement terms.

Some land trusts prepare ongoing or periodic updates for the baseline documentation at the time of the monitoring visit. Land trusts may file these photographs and other materials with the monitoring records or store them in a separate, supplemental baseline documentation file. Some land trusts update their baseline photographs at least once every five to ten years. Others do not routinely update baseline materials or photos according to an established timetable. Others prepare baseline documentation updates concurrently with the rerecording of the organization's easements, as may be required by state marketable title act statutes. A land trust's monitoring policy and procedures should include direction on when and how to supplement the baseline if this activity is part of the land trust's monitoring practice (see [Practices 11C1 and 11B3](#)).

### Monitoring with Landowners

A bonus of the monitoring visit is that it can provide a venue for the land trust and landowner to meet, talk and build a solid relationship — the cornerstone of effective easement stewardship (see [Practice 11D1](#)). This interaction helps landowners feel comfortable about contacting the land trust with questions or requests, thus serving the best interests of both parties. A monitoring visit is a great opportunity for a land trust to informally discuss its goals and its stewardship philosophy and to seek opinions and advice from landowners about the land trust's work.

Although land trusts usually encourage landowners to attend monitoring visits, monitors should consider how the landowner's presence might affect their inspections. For example, a landowner may have a personal preference for driving instead of walking, which may limit the area covered. Landowners may also lead the monitoring visit; therefore, the monitors end up viewing only the areas that the landowners have brought them to see. If a landowner's presence will impede a thorough inspection, then the monitor could meet with the landowner before or after the visit instead or follow up with a more extensive monitoring visit alone.

Monitors should be cautious about answering landowner questions during the visit if they feel they need additional time to review the easement or contact legal counsel. Landowners may ask for interpretation of easement clauses during the monitoring visit or ask at the conclusion of the visit, "So, everything's fine, right?" Monitors should expect these questions and be prepared with answers that neither dismiss the landowner's questions nor overstep the monitor's role. If the monitor states or implies that an activity "is fine," then the landowner can assume they have received official word from the land trust. If the monitor's response proves later to be incorrect, it



may put the land trust in a difficult situation, may strain the landowner relationship and may even affect the land trust's reputation in the community.

It is always better for the monitor to say something like, "I will review the easement terms following today's visit so I can answer your question thoroughly" or "I didn't see anything that concerns me, but if my supervisor notices anything from my report, she'll call you." Or, if the monitor thinks there may be a potential violation, they may say, "I will review the easement terms and call you if I have any questions" or "I have a few questions I want to talk with my supervisor about first and she'll get back to you." If the land trust is using volunteer or contract monitors, it should instruct the monitors to say that they will relay the landowner's questions to the land trust supervisor, who will follow up with them shortly.

Note that word choice and demeanor are key. Be polite and avoid accusations, so that the landowner does not become defensive or feel scolded. Specific training, including role-playing, on responding to landowner inquiries will help prepare monitors. One land trust reported that an inexperienced monitor called and left messages with a landowner, who did not return the calls. Finally, the monitor called again and left this message: "Unless you call me back, I'll go on your property." This declaration angered the landowner, and the monitor quickly learned better ways of seeking permission to enter a property.

## **Post-Monitoring Work**

The land trust needs to conduct post-monitoring work establish a record of the visit, update materials for the next monitoring inspection and address areas of concern. The results of monitoring must be documented promptly and saved to build a record for future monitoring and in case the land trust has to go to court over a violation. Establishing a system for post-monitoring work will help ensure the land trust is consistent, efficient and thorough in upholding its easement monitoring and stewardship obligations. Designating a point person or coordinator to oversee post-monitoring work will help ensure that the work is completed.

## **Transcription of Field Notes**

During a monitoring visit, a monitor may take notes or mark maps with observations. The monitor will need to write a separate report containing this information if it is not included on the monitoring form. The land trust should place a copy in the monitoring files. The monitor should avoid making any conclusions or subjective statements in these notes because these statements become part of the stewardship record.

## Photographs

Photographs taken on a monitoring inspection document changes to the property that directly relate to the conservation easement. Land trusts may file these photographs as a supplement to the original baseline documentation report or with the monitoring report. If they document a potential violation, the land trust usually files the photos with the monitoring records. In any case, all photographs should be labeled and keyed to photo points shown on a monitoring map or, if for baseline purposes, the baseline map. The photos' labels should state what the photograph depicts and why, where, when and by whom they were taken.

Like all easement documentation, land trusts should handle photos so that they will be admissible as legal evidence in court if needed. The photographer should sign and date them, and the record should include information on the photographer's role or affiliation (for example, volunteer monitor or staff position). The land trust can record this information in a format similar to that used for the baseline documentation reports (see [Practice 11B](#)). Some land trusts also have the landowner sign the photos. The photo documentation should comply with established organizational recordkeeping policies.

## Monitoring Reports

The completed monitoring report provides a written record that documents the condition of the property with respect to easement compliance and documents the fact that the monitoring occurred. This record may be used in legal proceedings, if the easement is violated. Land trusts should document annual monitoring activities promptly after the activities occur. A large gap between the monitoring event and the monitoring report could jeopardize the accuracy of the information in the report. The monitor may forget information and not completely and accurately fill out the report, or the monitor may leave the organization before completing the report. In addition, the monitoring report may be at risk of not being admissible as evidence in court by failing to meet the requirements of the business records exception to the rules against hearsay. One such requirement is that the record must be made at or near the time of the event.



**For accreditation, land trusts need to complete monitoring reports promptly after the monitoring visit. A land trust should not consistently have a gap of greater than three months between the monitoring date and when the report is completed.**

For tax-deductible easement donations, the IRS requires that the easement include the right for the land trust to enter the property for inspecting compliance with the easement terms and, in some easement audits, the IRS has sought proof that the land trust monitored the property. (Of course, land trusts must monitor all easements, regardless of whether they were the subject of an income

tax deduction.) A land trust may use its monitoring reports to demonstrate its commitment to protecting the conservation purposes of its easements.

The monitoring report should describe only factual or objective information. The monitor should sign and date the report and, if required by the land trust's policies or procedures, the landowner and other parties to the easement should sign it as well. Because the report may be used in legal proceedings, land trusts should be very thoughtful about what statements are included. If, for example, the land trust is investigating a potential violation, then the report may indicate that the land trust has identified an area or issue that needs additional follow-up.

At a minimum, a monitoring report form should include:

- Identification of the specific conservation easement being monitored
- Date of the inspection
- Identification of the monitor
- Observations relative to the restrictions, reserved rights and conservation values recorded during the inspection

In addition, land trusts may want to include the following:

- Monitor's affiliation, address and signature
- Property owner and location
- Information to substantiate the specific monitoring visit, such as:
  - Description of the area that was observed during the inspection (such as the entire property, eastern boundaries and south road and so forth)
  - Information that helps substantiate the monitor's observations (including substantiation of "no change observed")
  - Observation of the conditions and context of the inspection (such as weather or ground conditions, routes of travel, means of travel and so forth)
  - Presence or absence of landowner or other party



For accreditation, monitoring reports must include the following.

- Inspection date
- Property inspected
- Name of the inspector
- Observations related to the property's condition and conservation values
- Observations related to any potential conservation easement violations
- Report completion date

Monitors should complete all sections of the form and leave no blanks (they can write “not applicable,” if necessary). If they leave sections blank, the form may be deemed incomplete and raise questions in an enforcement or legal action. Some land trusts require a second person from the organization to review and sign the document to ensure that the form is complete and that they take any necessary follow-up actions. Another good quality control practice is to maintain a database that can track the monitoring status of the land trust’s entire easement roster.

### Following Up with Landowners

Land trusts should notify their easement landowners in writing that the land trust inspected the property and address any questions or concerns that arose during monitoring. This follow-up gives landowners certainty about whether the land trust found any issues that need to be discussed and creates a written record for the land trust files. It also builds trust with the landowner and community, demonstrating that the land trust is upholding its stewardship responsibility.

Many land trusts report positive outcomes from sending the landowner two copies of the signed monitoring report and asking that the landowner sign one copy and return it. They follow up with a phone call if the landowner does not return the copy promptly. The land trust retains the signed copy in the monitoring file. Some land trusts prefer to send a monitoring report to the landowner for signature only if the landowner accompanied the monitor during the actual inspection. Other land trusts simply summarize the results of the inspection in a letter. Some land trusts prefer to call all landowners in addition to sending a letter, so they have another opportunity for personal contact.

Caution is advised when providing the monitoring report to landowners. Although a land trust should be transparent about its practices and findings, the monitoring form may also include information that the land trust does not necessarily intend for the landowner, such as observations about land management concerns or other incidental remarks not directly related to the easement’s terms, which can lead to misunderstandings. In both the monitoring report and the follow-up letter, a land trust should give careful consideration to making any statement about easement compliance. It is often unrealistic to observe the entire property on a monitoring visit, so the land trust should avoid a declaration about compliance if there is a possibility that an unnoticed violation exists or that the monitor made an incorrect interpretation of the facts.

If there are issues or concerns that need follow up after monitoring, the land trust may want to consider phoning or visiting with the landowner about those items before describing them in a letter. A well-considered approach can help avoid creating an adversarial situation.

## EASEMENT CO-HOLDERS AND CONTINGENT INTEREST HOLDERS

If a conservation easement names another entity as a co-holder or grants contingent interests, such as third-party enforcement rights, to another entity, the land trust that holds the primary monitoring responsibility should keep the co-holder and/or contingent interest holders apprised of the monitoring schedule and outcome. Depending on the specific agreement between the co-holders and/or contingent interest holders, the land trust should keep any such entities up to date by providing copies of the monitoring reports, correspondence between the land trust and landowner, the baseline documentation report and associated supplemental materials. Conversely, if a land trust holds a non-primary easement interest behind another easement holder and monitoring is delegated to the other interest holder, the land trust should receive a copy of the monitoring report and keep apprised of any stewardship issues. Each party should know and understand its stewardship role in the easement, and if there is a suspected violation, all parties should be informed. If a co-holder fails to conduct annual monitoring, the land trust has the responsibility to conduct and document its own visits.

- ∞ For accreditation, if a land trust co-holds the conservation easement or shares monitoring responsibilities with another organization, a land trust can either document it monitored the conservation easement or retain documentation that the other organization completed the monitoring. If a land trust relies on another organization to monitor, the land trust needs to confirm the monitoring reports include the contents required for accreditation.

## STANDARD 11 CONSERVATION EASEMENT STEWARDSHIP

### E. Conservation Easement Enforcement

- 1. Adopt a written policy and develop written procedures for documenting and responding to potential conservation easement violations

Accreditation indicator elements located at [www.landtrustaccreditation.org](http://www.landtrustaccreditation.org)

#### VALUE OF ENFORCEMENT

A land trust must uphold its easements in proportion to the challenge presented. In addition to protecting the conservation values of the land, proportional response is needed to:

- *Engender public confidence in the easement program.* Appropriately addressing violations proves to the owner and the public that the land trust stands by its easements.
- *Maintain the land trust's legal authority to enforce.* Letting a violation slide could jeopardize a land trust's ability to enforce the easement. A court may interpret delayed or past failure of enforcement as a waiver of the land trust's rights to enforce a particular provision. Further, a court may limit a land trust's right to enforce other terms if it has allowed previous breaches of the easement.

- *Maintain the land trust's ability to accept tax-deductible easement gifts and its tax-exempt status.* A land trust's failure to enforce its easements could disqualify the land trust from accepting tax-deductible easements and jeopardize the deductibility of easement gifts made to it. U.S. Treasury Department regulations specify that to be eligible to receive tax-deductible easement donations, an organization must "have a commitment to protect the conservation purposes of the donation, and have the resources to enforce the restrictions" (see Treas. Reg. 1.170A-14(c)(1)). A land trust's 501(c)(3) status also could be in jeopardy if it were shown that the organization relinquished enforcement rights to benefit private individuals.

## IMPORTANCE OF ENFORCEMENT POLICY AND PROCEDURES

### Maintaining the Public Trust and Landowner Relationships

Your land trust must maintain public trust to be successful. Without this trust, you will not be able to raise operating money or encourage landowners to partner with you to protect important lands. Enforcing and defending conservation easements is an essential aspect of building that trust. By adopting and implementing enforcement policy and procedures, your land trust demonstrates its intent to uphold its obligations to the original grantor and to provide perpetual support for the purposes of each conservation easement.

An enforcement policy guides your land trust through violation resolution and helps your land trust address, manage and resolve every easement violation in a fair, conscientious and effective manner. A policy helps your land trust assess the extent of violations and respond proportionately to the circumstances, consistent with the law and respectful of landowners. A well-written enforcement policy and procedures will help your land trust become a partner with the landowner instead of a police officer waiting to jump on an infraction.

## **A Guide to Navigating Difficult Situations**

An enforcement policy holds your land trust steady during the turmoil of evaluating and documenting violations and provides guidance on determining whether a violation has occurred and how it should be addressed. It is also valuable in defining upfront who has the authority to act, so that your land trust avoids confusion, miscommunication, delays and missteps. With a defined process and roles, you can focus on the violation rather than on determining who has to be involved and how. Adopting and implementing an enforcement policy will ensure that your land trust does not skip any important steps in resolving an easement violation. A policy also ensures that your land trust response is disinterested and equitable by creating a consistent standard that is followed in every violation situation. Such a standard helps prevent conflicts of interest and preferential treatment of insiders, favorite landowners and major donors. Preventing conflicts of interest and adhering to an enforcement policy will help you avoid IRS sanctions against your land trust for conferring private inurement or for failing to enforce easements that qualified for federal tax benefits.

### **Legal Reasons**

Internal Revenue Service Treasury Regulations Section 1.170A-14 requires that qualified conservation easements (easements that qualify for federal tax benefits) must be granted exclusively for conservation purposes. To be eligible for a federal income tax deduction, the land trust must protect the purposes of the conservation easement forever. This requirement means that your land trust must address every violation; however, how to address those violations is left to the land trust's best judgment and discretion. Your land trust's conservation easement enforcement policy and procedures will articulate that best judgment and provide uniform steps to apply it on a case-by-case basis for each individual conservation easement and owner of conserved land.



In addition to helping the land trust meet federal law, a good enforcement policy helps in the event of legal action. Having a policy that addresses every violation appropriately ensures that your land trust maintains its right to enforce its conservation easements because you have created a pattern of consistent responses to every violation situation. Being able to demonstrate such consistency is essential if your land trust ever winds up in court defending or enforcing an easement. Courts may determine that your land trust waived its enforcement rights by being casual or capricious in addressing previous violations.

Also, note that your land trust may forfeit its right to pursue a judicial remedy if you wait too long after discovering a violation. Having a policy and following it in every case will help your land trust act effectively in the case of a violation.

## **DEVELOPING AN ENFORCEMENT POLICY**

Enforcement policies typically address three areas:

1. The overall policy guidelines and criteria for identifying violations and categorizing their severity
2. An analysis or spectrum of appropriate response to each violation category
3. The specific procedures that a land trust uses to address violations, including communication with the landowner and the role of various parties, such as the board of directors

Some land trusts meld these three items into one document; others keep the policy and the procedures in separate documents. The overall policy is usually in a form that you can share with landowners, potential easement donors and the public. Some land trusts choose to keep procedures in a separate document to be used internally only, following the advice of some attorneys who caution against publicizing detailed violation resolution procedures. They argue that if a land trust fails to follow every single procedure to the letter every time a violation occurs, such failures may be used against the land trust in court. Other land trusts make all of their policies and procedures publicly available, believing that the more transparent they are, the more public confidence they will generate. Consult your attorney about the appropriate balance for your organization. If you choose to combine policies and procedures, you may want to explicitly state that the land trust has the ability to adapt its procedures in response to each potential violation. Because no one can anticipate all circumstances, such language makes it clear that land trust personnel, whether staff or volunteer, have the discretion to reasonably and appropriately adapt the procedures as they deem proportional to the circumstances. Another way to address the concern about sharing procedures is to separate your land trust's violation resolution philosophy from the actual violation procedures and simply make the philosophy component of the enforcement policy available to the public.

∞ For accreditation, a land trust must have a violation policy and/or procedures. There are no specific elements that the policy and/or procedures need to include. Accreditation focuses on how a land trust addresses conservation easement violations (see Practice 11E2). The documentation must show a land trust's actions were timely, were consistent with the conservation values and/or any restrictions on the property and did not result in private inurement or impermissible private benefit. In addition, the land trust needs to inform or involve its board in the resolution, as appropriate to the scale of the violation.

## Basic Elements

Enforcement policies typically include:

- *A statement about the land trust's philosophy on easement violation resolution.* The underlying philosophy of most land trust enforcement policies has two main points: first, maintaining landowner relationships by adopting a cooperative, rather than an adversarial, approach when seeking to enforce or defend conservation easements; and second, responding quickly to all violations to uphold public confidence, maintain the right to enforce and comply with laws.

Land trusts should also consider their mission and goals when developing their violation resolution philosophy. Land trusts with a mission to conserve lands used intensively by humans, often referred to as *working lands*, may find that they have more easement violations and, thus, need different responses to violations than a land trust focused on natural area protection with easements that generally allow only minimal human activity at most. Consider evaluating the spectrum of human involvement allowed by your conservation easements, as well as the spectrum of likely third-party violations, when drafting your enforcement policy.

The land trust's philosophy statement might also include language that reflects the land trust's intent to:

- Address every violation proportionately to its scope, scale, severity of resource impact and duration
- Be at least net neutral with respect to the conservation values, purposes and intent of the conservation easement, especially with respect to the restricted or prohibited uses
- Uphold the documented intent of the original grantor
- Comply with federal, state and local law
- Maintain public and landowner confidence in the land trust
- Respond quickly and follow the enforcement policy and procedures
- Support the land trust's mission
- Preserve its tax-exempt status as a charitable organization
- Not knowingly confer private inurement or impermissible private benefit
- Maintain landowner goodwill to the fullest extent possible
- Require maintenance of records and funds to provide sufficient stewardship services
- Conduct annual monitoring visits to the conserved land and, if possible, with the landowner

- *Assessment of violation severity.* Not all violations are the same in scope, scale, severity or duration. Your land trust's enforcement policy should acknowledge this reality and identify a method to rate the violation on a scale of severity. Identifying the severity of the violation is important so that your land trust response is proportionate to the impact of the violation.

Most land trusts adopt at least three categories of violations: minor, moderate and major. Because some violations are worse than minor but not major in terms of severity, the moderate category allows for a more accurate classification of a violation and is better understood by an outside party. Easement violations that are classified as *moderate* and *major* should be limited to those serious violations that go to the heart of the property's conservation attributes and the easement's purposes. Classifying a violation as major is a significant event; therefore, you should be certain that the resource damage truly is major in scope, scale, severity and duration before ranking the violation as major. If you define these types of violations differently, you may be in a weak position to insist that a landowner correct the violation.

Some land trusts separate technical deficiencies (for example, paperwork lapses) from minor violations that cause actual negative resource damage and thus have four categories of violations: technical, minor, moderate and major. Land trusts should track technical lapses because there may be a cumulative negative effect on the easement. However, land trusts should also be careful about appearing overly bureaucratic in responding to paperwork lapses as violations when no resource damage occurs on the property because of the incident.

Other land trusts simply adopt two categories of violations: minor and major. Your land trust should determine which approach best serves your mission, will work for your land trust procedurally and is most acceptable to your landowners and your community. The land trust's enforcement policy should describe what criteria demarcate each violation category.

- *Description of possible responses in proportion to violation severity.* Everyone wants to be treated fairly. We accept bad news better if someone delivers it kindly and if the consequences are proportional to the action. Your enforcement policy should address the array of possible responses to violations and generally assign acceptable responses based on the severity categories you develop. The list of acceptable responses should be considered only as a guideline, not a rigid and inflexible list. In analyzing an easement violation, you may find that with more information or landowner interaction, the category shifts or a different response might be more effective. If your land trust has an inventory of the responses at hand and knows the consequences associated with each, you can respond more quickly and effectively to violations.
- *Effect of mitigating circumstances.* Life is messy. It will serve your land trust well to never assume that landowners intend to violate their conservation easements. For example, a landowner may have simply forgotten that the conservation easement restricts the activity in question. Perhaps the landowner even thought they were following the easement in good faith but interpreted a clause incorrectly. Often, third parties cause the violation. Sometimes the land trust may have contributed to the violation through poor conservation easement drafting, poor communication, failure to adequately monitor the property, poor recordkeeping, inadequate follow-up to questions from landowners or other circumstances. Identifying appropriate mitigating circumstances is an important part of your land trust's enforcement policy. In developing or refining your policy, you should also discuss when and how much weight to give to mitigating circumstances.
- *Additional requirements.* The enforcement policy should include additional requirements, such as compliance with the land trust's conflict of interest policy, funder requirements and mission, as described by the land trust's philosophy statement on easement violation resolution. Other items the land trust will want to address in its policy (or in the procedures) include:
  - Whether the land trust will require landowners to reimburse the organization for the costs of enforcement or defense
  - Precedents (is each violation handled on a case-by-case basis or do they create precedents?)
  - The role of the board and the chain of decision-making
  - A system to learn from violations and collect data
  - Violation prevention strategies, tools and techniques

- Who, how, whether and when to address media, neighbor or other public inquiries about violations and violation response
- When the land trust’s attorney should be contacted and the attorney’s role in violation resolution
- As applicable, notifying partners or co-holders in accordance with deeds or agreements

Whatever form your policy takes, the land trust must ensure that all resolutions are legally permissible and consistent with the conservation purposes and documented original grantor intent. Your policy should also contain a prohibition against allowing private inurement and impermissible private benefit to arise from a violation resolution (see [Practice 2C1b](#)).

## CRAFTING ENFORCEMENT PROCEDURES

Land trusts typically follow seven steps when addressing a potential violation. The process is iterative, and the order of the steps may vary, depending on the land trust and the circumstances, but most land trusts establish procedures that generally follow this seven-step pattern:

1. *Identify a potential violation.* Land trusts discover most easement violations through a regular and (at minimum) annual program of easement monitoring (see [Practice 11C](#)). Violations may also be reported by third parties (such as neighbors or land trust members) who observe an activity on the easement land. It is important to educate all your volunteers and staff to be alert for potential violations when they are not “on duty.” All reports of violations should be checked immediately by either calling the landowner to inquire about recent activities (while taking care to not accuse anyone of violating the conservation easement) or by visiting the property within the week, depending on the nature of the report.
2. *Document the potential violation.* When you discover a potential violation, you should document it immediately as appropriate to the circumstances (see [Practice 11E2](#) for more information). Note that this step is iterative as the land trust evaluates the easement language, reviews its policies and procedures and receives information from the landowner. It is important that the land trust document all of its steps and findings, from beginning through final resolution. When crafting your procedures, also make a note to inform all your insurance carriers, as appropriate, as early in the process as possible to ensure that you do not miss a critical deadline that might bar later coverage of a claim.

3. *Review the documentation.* Immediately after receiving information about a potential violation, it is critical that you analyze the information and secure legal advice about the potential violation as appropriate (see [Practice 11E3](#)). Other expert advice may also be necessary to determine if, in fact, a violation of the conservation easement has occurred.
4. *Determine if it is a violation and, if so, its severity.* If all your records show that the activity or use you identified is a violation, then you need to determine the violation's effect on the property's conservation resources. What harm did the activity do to the resource? How easily can it be fixed? What is involved in fixing it? Now is the time to analyze scope, scale, severity and duration of the violation and apply your violation categories (for example, technical, minor, moderate or major).
5. *Identify potential mitigating factors and choose an appropriate enforcement response.* At this point, many land trusts require that staff or volunteers inform the organization's board chair immediately and legal counsel (if not already informed) about the nature of the violation and the evidence supporting the determination. Doing so may slow the process of resolving the violation, so you should take steps to ensure the fastest possible review commensurate with the severity of the violation. Naturally, major violations will need more time to resolve.

Most land trusts consider certain mitigating circumstances when determining their response to a violation. While some land trusts consider mitigating factors when determining the severity ranking, most land trusts use only a resource-based analysis for this determination and then consider mitigating factors in determining the most appropriate response to the violation.

Mitigating factors can help guide your land trust's response to the violation or influence your severity ranking. Whatever mitigating factors your land trust decides to consider, document them in writing so that you consider the same factors in every case, treating all landowners fairly.

### Positive Mitigating Factors

- The landowner demonstrates a legitimate misunderstanding of the easement.
- The land trust did not follow its own procedures, such as failing to give a landowner a timely response to their inquiry about a proposed activity. Or, the land trust's actions contributed to the violation (for example, poor communications with the landowner).
- A third party committed the violation without the landowner's consent or knowledge.
- The landowner willingly and promptly stopped the prohibited activity and resolved the violation.
- The landowner's intent was consistent with the conservation purposes of the easement.
- The violation was an innocent mistake by the landowner.
- The easement was poorly drafted or confusing.
- The landowner has special circumstances that cause the land trust to feel compassion.
- The original easement grantor expressed a particular special intent (recorded in a written document in the land trust's possession) regarding the particular resource in question.
- Funders or partners of the land trust have strong opinions about the violation.
- The violation and the land trust response will have a persuasive effect on public confidence in conservation.

### Negative Mitigating Factors

- You can *demonstrate* (not just suspect) that it was an intentional violation.
- The landowner has a *documented* history of violating their conservation easement.
- The landowner violated local, state or federal laws.
- The landowner is uncooperative.



6. *Communicate with the landowner.* Once it has concluded that there is a violation of the easement and considered mitigating factors, the land trust should communicate with the landowner that it has found a violation of the easement. While a letter or phone call could be sufficient in minor or technical violations, a meeting will be necessary in moderate or major violations. A cooperative, face-to-face meeting to view the land, review the relevant easement restrictions and discuss resolution of the problem is usually effective and can be a good way to strengthen relationships. Note that this communication should be the first time you use the term *violation* (in step one, you are in fact-finding mode and should not making formal notification of a violation).

Before contacting the landowner, identify: (a) who has the authority to determine the appropriate course of action with respect to all violations, and (b) who implements the violation resolution with the landowner. The land trust staff or volunteer entrusted with approaching the landowner needs to know the degree of flexibility they have in negotiating with the landowner about implementing the proposed resolution.

7. *Determine the level of board involvement.* Some land trusts (usually only the very large, well-staffed land trusts with in-house legal counsel) handle all violations at the staff level and inform the board only of major violations and the steps staff is taking to pursue resolution. How your land trust arranges these responsibilities will be determined by the size of your land trust, your land trust personnel's experience, the capacity of your organization to handle the violations, your land trust's total number of violations and conservation easements and your land trust's written policies regarding violation resolution, amendments and stewardship philosophy. At a minimum, the land trust board should receive a regular report on all easement violations and how they were resolved, so that the board can fulfill its legal and fiduciary responsibilities to the organization.

8. *Record the resolution and lessons learned.* Describe how your organization will document the actions it took to address and resolve the violation and confirm that the landowner has, in fact, taken the corrective steps needed to resolve the violation. Finally, your procedures should include appropriate written communication to the landowner about the violation and the agreed-upon steps to correct it (if any) or a confirmation that the landowner will cease any activities that led to the violation. The type of communication is usually dependent on the level and type of violation so that a very severe violation will have a formal notice but a technical defect with no adverse impacts might have a very light thank-you and reminder about future compliance. The type and quantity of documentation is highly dependent on the facts and circumstances of each violation or technical lapse.

In addition, your land trust will want to learn from the violations it experiences. Collect what you learn from experiencing violations and from landowner feedback. Analyze and discuss this information internally to help improve project development, conservation easement drafting and stewardship procedures. This information will also help you identify trends and issues and track the effectiveness of your organization's responses to easement violations.

See [Practice 11E2](#) for further discussion of investigating potential violations and documenting action taken.

## ADDITIONAL RESOURCES

- [Sample for Practice 11E1: Conservation Easement Enforcement Policy Template, version 1](#)
- [Sample for Practice 11E1: Conservation Easement Enforcement Policy Template, version 2](#)

# Standards and Practices

## STANDARD 11 CONSERVATION EASEMENT STEWARDSHIP

### E. Conservation Easement Enforcement

- 2. Investigate potential violations in a timely manner and promptly document all actions taken

Accreditation indicator elements located at [www.landtrustaccreditation.org](http://www.landtrustaccreditation.org)

#### IDENTIFYING A POTENTIAL VIOLATION

A land trust may discover a potential violation on a monitoring visit, through a neighboring landowner or other interested party or during informal observation. It may have been caused by original owners, new owners, abutters or trespassers. The land trust's first response should be twofold: promptly document the violation and contact the landowner to discuss the situation. The land trust should be sure to consult its attorney with regard to any enforcement action as appropriate to the scale of the violation (see Practice 11E3).

## DOCUMENTATION

When you discover a potential violation, you should document it immediately as appropriate to the circumstances and consistent with your enforcement policy and procedures (see [Practice 11E1](#)). A thorough record of the violation will be essential should the land trust need to go to court. You may need to schedule another site visit to further document and better understand the situation, as well as the landowner's intentions. You should document everything necessary to accurately describe the possible violation. Depending upon the circumstances, such documentation may include photographs, measurements and mapping of the particular location in question and field notes, as well as other information relevant to the potential violation. If the violation you identified is a mere paperwork lapse, then documentation may be minimal and field work will be much less extensive or may not be necessary at all.

Be sure to talk with the landowner to discuss what you found. It is easy to ask about the physical facts without stating that what you identified might be a possible violation. It is important to choose your words carefully when asking the landowner about an activity or use you identified as a potential easement violation. Therefore, you should use language that invites the landowner to talk to you about their actions, rather than using words that might be interpreted as accusatory or critical. For example, you might call the landowner and (after making small talk) casually mention that you noted some trees had been cut down. Then wait for the landowner to reply, basing your next response on what they say.

At this point, it is too early for the land trust to send a formal letter to the landowner or even for verbal communication of a possible problem. Before taking either of these steps, the land trust should evaluate the situation internally and with legal counsel.

Once these essential first steps are complete, your land trust should immediately alert the designated land trust personnel, whether staff or volunteer, of the potential violation in accordance with the land trust's policy or procedure. The designated lead on resolving the violation should coordinate the completion of the remaining steps. Time delays at this point can be harmful and can further complicate resolution of the violation. The land trust should inform or involve its board in the violation resolution. At a minimum, the land trust board should receive a regular report on all easement violations and how they were resolved, so that the board can fulfill its legal and fiduciary responsibilities to the organization.

## Examples of Documentation

Appropriate and proportional documentation is a judgment call based on facts and circumstances that may evolve over time. Here are some common documentation examples:

1. A chronology, including dates, of all the events of the violation, from the monitoring visit or other discovery of the possible violation through to full confirmation of any required remediation, cost and fee recovery and litigation resolution, as applicable. Documentation is in proportion to the actual damage to the conservation purposes of the easement. For example, a technical lapse may require only a note in the monitoring report and a follow up, but documentation of a major permanently damaging violation may be pages long with extensive detail.
2. A narrative of who, what, when, where, how and other relevant details of the potential violation. Supplement this narrative if the violation unfolds, revealing additional damage, mitigating factors and other relevant details.
3. Maps, measurements, photos and other relevant physical information regarding on the ground changes of who, what, when, where, how and other relevant details of the potential violation. Supplement this documentation if the violation unfolds, revealing additional damage, mitigating factors and other relevant details.
4. Paper record violations, such as division prohibitions, prohibited overlay easements, leases, rights of way, condemnation, partition and other paper violations.
5. Assessment of mitigating factors and application to the violation.
6. Outside expert reports and assessments of the actual losses and damages, including costs to restore or remediate that are proportional to the damage. This documentation is also required to support any paper record violations so that the land trust can prove actual loss to the landowner, attorneys, judges and the public.
7. Monitoring reports since the easement inception. Failing that, a long history of consistent diligent monitoring to demonstrate credibility of records, as well as to pinpoint the extent of the violation and when it occurred.
8. All communications, written, electronic and verbal (this includes texts, emails, posts, blogs, photos and all social media), with landowners, neighbors, stakeholders, public, media, board, land trust personnel and partners.
9. Board minutes with a record of discussions or decisions about the violation.

10. File memos of all verbal communications.
11. Legal assessment of the easement language as applied to the actual damage and violation, including risk assessment, appropriate damages and required proof.
12. Financial assessment, as applicable, of both the damage and extent and cost of remediation.
13. Documentation of compliance with policy, procedure, partner agreements and funder conditions, as applicable, including conflict of interest and any other applicable policy. Remember that you may have to document negatives, such as no partner or funder notices required, no mitigating factors and other similar items, if listed in your policy or procedures but not present in the particular case. This is especially true if your attorney expects this matter will go to court.
14. Media reports.
15. Communications plan and implementation.
16. Attorney retention agreement.
17. Violation resolution and mitigation required, including monitoring and compliance.
18. Cost and fee recovery.
19. Any mediation and litigation documents. If there is full litigation, you may have an entire separate set of documentation.
20. Notices and responses from insurance carriers, as well as any fulfillment of information requests and updates.
21. IRS Form 990 information and other data entry for tracking and information requests, such as Land Trust Alliance census data.

For more information, see [Practice 11E1](#) for a discussion of enforcement policies and procedures.



For accreditation, a land trust must have a violation policy and/or procedures (see [Practice 11E1](#)). Accreditation focuses on how a land trust addresses conservation easement violations. The documentation must show a land trust's actions were timely, were consistent with the conservation values and/or any restrictions on the property and did not result in private inurement or impermissible private benefit. In addition, the land trust needs to inform or involve its board in the resolution, as appropriate to the scale of the violation.

## ADDITIONAL RESOURCES

- *Practical Pointers for Land Trusts When Facing a Lawsuit or Other Legal Challenge of Any Size*. Washington, DC: Land Trust Alliance, 2013.

# Standards and Practices

## STANDARD 11 CONSERVATION EASEMENT STEWARDSHIP

### F. Approvals and Permitted Rights

- 3. Maintain a permanent record of all notices, approvals, denials, interpretations and the exercise of any significant permitted rights

Accreditation indicator elements located at [www.landtrustaccreditation.org](http://www.landtrustaccreditation.org)

#### MAINTAINING A PERMANENT RECORD

Equally as important as closing documents, a land trust's easement stewardship files must track a property's stewardship issues and all significant stewardship actions taken by the landowner and land trust. Stewardship records should be created at the time of the action, managed and retained as a permanent record according to the land trust's written records policy (see Practices 9G1 and 9G2).

- ∞ For accreditation, a land trust's records policy needs to cover organization, transaction and stewardship records. A land trust should retain the originals of stewardship records and keep them generally secure and protected from damage or loss.

Many easements contain specific permitted (or reserved) rights or require that the land trust approve certain landowner actions. It is essential that a land trust track these rights and its responses in order to evaluate its capacity to steward its easements, respond to landowner information requests and prepare for any enforcement or defense actions. For every easement, the land trust should have complete and timely information about all notices, the exercise of significant permitted rights, any granted approvals (or denials) and major interpretations.



## NOTICES

All easements should contain a “Notice” section that requires the parties to the easement to use specified processes for notifying each other of certain activities. These can include notification of the exercise of reserved rights, transfer of ownership, completion of management plans and so on. Whenever the land trust creates or receives a notice as required by the easement, that notice and any responses should become part of the permanent file record.

## APPROVALS AND DENIALS

Often the land trust has the right or obligation to review and approve certain activities or actions by the landowner. These could include approval of the siting of agricultural buildings or structures, recreational structures, recreational events, exercise of reserved rights, forest management activities, land-clearing and so on.

Whenever such approvals are requested by the landowner, whether informally or in writing, they should be documented along with any and all responses, including requests for additional information, suggested revisions to the proposal and any formal approvals or denials. For example, if the easement requires the landowner to submit a written forest management plan prior to any commercial timber harvesting, the land trust records should include:

- A copy of the management plan
- Any comments by the land trust or revisions to the plan recommended by the land trust
- Reports or reviews by any outside professionals engaged to review the plan
- Any correspondence (including summaries of verbal communications)
- The formal approval (or denial) of the plan by the land trust

If there are specific dates for review and approval by the land trust of the plan, all records should show that those dates or deadlines were met or, if not, why, and if extensions were agreed to by both parties.

## Tracking Approvals and Reserved Rights

It is important that the land trust develop a system for documenting approval requests, the review process and the decision, so that a paper trail exists for future reference. Thorough documentation will help the land trust be consistent in future approval requests and avoid confusion about whether or not prior permissions have been granted.

One mechanism for tracking approvals and executed reserved rights is to have a master sheet in front of the project file that lists the reserved rights and the date of their execution. Some land trusts use a more detailed form that is signed by both the landowner and the land trust when a reserved right has been exercised. Some land trusts that hold many easements with various complex and diverse reserved rights and required approvals use a master database to track the execution of these rights electronically.

If a reserved right is executed that is a one-time right—such as the right to build a house or subdivide the property—the land trust should consider recording a notice or affidavit of the execution of that right in the office of the recorder of deeds, registrar or registry of deeds where the property is located. The act of recording provides constructive notice to the general public and puts any potential future owner of the property on notice that the specific reserved right in the easement document has already been exercised.

## INTERPRETATIONS

A land trust may issue an interpretation letter to a landowner responding to a question about whether particular uses or activities would be allowed under the terms of an easement. For example, suppose a farmer wants to know whether giving hayrides for a fee is allowed as an agricultural use on easement land. The easement does not specifically address this use. Rather than permanently amending the easement to allow (or prohibit) the hayride right for all future owners, the land trust could address the specific question in an interpretation letter, often setting limits on what the landowner can do and stating the land trust rationale. Interpretation letters are generally not recorded in real property records, but should be retained in the stewardship files.

All correspondence related to the requested interpretation should also be retained in the stewardship records. It is entirely possible that any such interpretation letters provided by the land trust will become important documents should future activities by the landowner vary from the original request or new owners seek to undertake a similar activity.

For more information on responding to landowner required notices or requests for interpretation or approvals, see [Practice 11F1](#). For more information on maintaining permanent files, see [Practice 9G](#).

- ∞ For accreditation, the activities approved by the land trust, using approvals or interpretations, need to be consistent with the conservation easement purposes and terms and need to not confer private inurement or impermissible private benefit.

# Standards and Practices

## STANDARD 11 CONSERVATION EASEMENT STEWARDSHIP

### H. Amendments

- 1. Adopt and follow a written policy or procedure addressing conservation easement amendments that is consistent with the Land Trust Alliance Amendment Principles

Accreditation indicator elements located at [www.landtrustaccreditation.org](http://www.landtrustaccreditation.org)

#### CONSERVATION EASEMENT AMENDMENTS

Conservation easements are written to last in perpetuity, but circumstances change over time. Land is transferred to new owners, land uses change or new laws are written. As easements mature, land trusts and property owners may seek amendments to modify the terms of the easement. Some amendments may have no practical effect on the property's conservation values; some may even be advantageous.

The need to amend an easement is rooted in our inability to predict all of the circumstances that may arise in the future. Any decision to amend (or not to amend) a conservation easement must serve public interests by ensuring that conservation easements not only endure but are also robust, enforceable and fair, both to the public and to the landowners. The concept of amendment recognizes that neither original grantors nor land trusts are infallible, that natural forces can transform a landscape in a moment or over a century and that amendments can strengthen protections as well as weaken them. Exceptional circumstances sometimes warrant amendments, and a land trust should be prepared for that possibility while also remaining vigilant in protecting an easement's purposes and restrictions forever.

## AMENDMENT POLICIES

All land trusts that hold easements should have a written policy guiding amendment decisions. The amendment policy provides a land trust with a structure in which to consider a potential amendment, make a decision and then document the reasons for its decisions. A written amendment policy identifies standards for accepting or rejecting amendments.

An amendment policy also helps the land trust comply with the law, address amendment proposals consistently over time and further the mission of the organization. It also informs landowners, grantors, organizational members, funders, supporters and the general public about the land trust's intent to uphold the permanence of the protections afforded by a conservation easement while still maintaining appropriate flexibility to respond to unanticipated change in a principled fashion. An amendment policy demonstrates that the land trust is prepared to address changes in ways that respect the grantor's documented intent, the public interest and specific easement purposes and restrictions; are in full compliance with the law; and advance the land trust's charitable mission.

### Contents of an Amendment Policy

Amendment policies typically include:

- *Statement of the land trust's philosophy on amendments.* An amendment policy should declare that easements are perpetual, consistent with applicable law. Any amendment should enhance an easement's protections or at least be neutral with respect to impacts on protected conservation values and purposes. The statement should also express the land trust's mission and goals relating to amendments.
- *Amendment Principles.* An amendment policy should include the standards or thresholds that a proposed amendment must meet in order to be acceptable. A land trust should directly incorporate the [Amendment Principles](#) into its policy. No amendment policy should be more permissive than the Amendment Principles allow; however, some land trusts may choose to adopt more conservative amendment guidelines
- *Additional requirements.* The policy should also include any additional requirements recognized by the land trust such as compliance with its conflict of interest policy (see [Practice 4A1](#)), compliance with grantor and funder requirements and payment of the land trust's costs associated with the amendment.

- *Allowable purposes of amendments.* Many amendment policies list circumstances under which an amendment proposal may be considered, such as to address mutual errors, add acreage, add restrictions, remove reserved rights or resolve a conservation easement violation. Others provide a more open-ended statement of the types of amendments that the land trust may allow.
- *Practical details.* The amendment policy usually explains how a landowner may make an amendment request (or the circumstances under which a land trust can initiate an amendment proposal), identifies supporting materials they must submit with the request and the required fees and indicates who will review the request, who will make the decision and how the decision will be communicated to the landowner. These points may be set out in a separate procedures document or included in the policy. Additional practical details include when and how the land trust will supplement baseline documentation with a current conditions report, update the title search and title insurance policy and who will pay for it.
- *Procedures.* Sometimes the land trust's evaluation procedures are included directly in the amendment policy and sometimes they are set forth in a separate document. At the very least, however, the policy should include what role the board and any committees play in the amendment process.



For accreditation, a land trust must have an amendment policy and/or procedure that includes the following:

- Requires amendments to have a net beneficial or neutral effect on the protected conservation values
- Prohibits impermissible private benefit and private inurement

## AMENDMENT PRINCIPLES

A conservation easement amendment should conform to *all* of the following amendment principles:

1. Clearly serve the public interest and be consistent with the land trust's mission
2. Comply with all applicable federal, state and local laws
3. Not jeopardize the land trust's tax-exempt status or status as a charitable organization under federal or state law
4. Not result in private inurement or confer impermissible private benefit

5. Be consistent with the conservation purpose(s) and intent of the easement
6. Be consistent with the documented intent of the grantor and any direct funding source
7. Have a net beneficial or neutral effect on the relevant conservation values protected by the easement

### **Amendment Principles in Detail**

What is a land trust to do when faced with a landowner who wants to amend an easement? First, a land trust should have a written policy that helps it comply with the law, addresses amendment proposals consistently over time and furthers the mission of the organization, while also signifying to landowners and the public that the organization is serious about honoring the permanence of protections afforded by their easements. At the core of a sound amendment policy are the seven Amendment Principles that, when applied to a proposed amendment, will help ensure the land trust's decisions are sound and within the law. No amendment policy should be more permissive than the Amendment Principles allow, but some land trusts may choose to adopt more conservative amendment guidelines. A conservation easement amendment should meet *all* of the Amendment Principles—failing even a single one should be cause for rejecting the amendment.

The Amendment Principles, taken as a whole, set a solid bottom line for considering proposed amendments. They provide the foundation on which a land trust can methodically analyze a proposal and document how it made a decision.

## Amendment Principles

**Principle 1: The amendment clearly serves the public interest and is consistent with the land trust's mission.**

A land trust's mission, goals and underlying obligation to serve the public interest always steer amendment decisions. Many amendment proposals involve unanticipated circumstances that challenge an organization to consider its role in the community, its ethical and legal obligation to provide public benefit to its broad constituency, including its members and the community it serves, equity to all landowners and its obligation to uphold commitments made upon accepting gifts of money or interests in land.

Reflecting on mission, goals and public interests to be served can help an organization suggest and negotiate creative solutions to controversial and complex amendment proposals and thereby achieve genuinely positive results. In other instances, a land trust's obligation to fulfill its mission and serve the public interest might cause it to deny a proposed amendment. For instance, a land trust facing a proposal to allow more intensive agricultural practices on an existing dairy farm should consider the amendment's incompatibility with organizational and easement goals, which include supporting the state's agricultural economy, scenic beauty and cultural heritage through conservation of working farms.

**Principle 2: The amendment complies with all applicable federal, state and local laws.**

Evaluating compliance requires careful analysis of all relevant laws; the specific conservation easement's terms; the organization's amendment policy; the substance of the proposed amendment and its foreseeable effects; whether the easement was the subject of a federal income tax deduction; whether it was the result of a regulatory process, subject to continuing regulatory oversight; whether it was purchased and any of the funding sources may have a legal or programmatic interest; and so on.

The legal test also requires consideration of written representations made to the grantor or funding source that may be affected by the proposed amendment. State laws may limit the nature of amendments that can be made or impose additional requirements on the land trust that require assessment by qualified legal counsel.



<p><b>Principle 3: The amendment does not jeopardize the land trust’s tax-exempt status or status as a charitable organization under federal or state law.</b></p>	<p>A land trust must preserve its tax-exempt, charitable status. At a minimum, the land trust must protect its continuing existence and ability to hold conservation easements. For example, agreeing to an egregious amendment could cause the IRS to terminate a land trust’s nonprofit status or to reject a future easement deduction because the land trust has not demonstrated its commitment to protect the conservation purposes of the donation as required by §170(h).</p>
<p><b>Principle 4: The amendment does not result in private inurement or confer impermissible private benefit.</b></p>	<p>A land trust must observe this requirement to preserve its tax-exempt status.</p> <p>Does the proposed amendment involve a board member, staff or other insider to the organization? Private inurement is flatly prohibited by IRC §501(c)(3) and accompanying regulations.</p> <p>Does the proposed amendment involve potential private benefit to any private parties? Section 501(c)(3) also prohibits tax-exempt organizations from conveying impermissible private benefit.</p> <p>If the potential for private inurement or impermissible private benefit exists, the land trust must either deny the amendment or eliminate the potential financial gain. Land trusts can determine if there is impermissible private benefit or private inurement by obtaining an appraisal, a letter of opinion from a qualified real estate professional or correspondence with an attorney, for example. Potential financial gain to the easement landowner might be offset by adding new restrictions to the easement that enhance conservation values or reduce the value of the land or by placing additional land under easement.</p> <p>Any negotiated solution should always result in clear protection of the public’s interest in land conservation. The land trust should not accept an offered cash donation as a full offset to the potential financial gain.</p>

**Principle 5: The amendment is consistent with the conservation purpose(s) and intent of the easement.**

In determining consistency, land trusts must consider the general purposes of the easement as a whole, as well as the impacts an amendment may have on the specific resources and conservation values protected by the original easement. Well-drafted easement language may assist in determining whether such an amendment is acceptable.

Proposed amendments may result in minor shifting of relative priorities among specific conservation purposes and may be seen as causing negative impacts to some purposes, with positive impacts to others. For example, a proposal to allow a new agricultural management practice might, as a side effect, favor the easement's agricultural purposes over its wildlife habitat protection purposes. Determining whether such a shift is acceptable is a matter of scope and scale, requiring careful analysis and best judgment on the part of the land trust, all evaluated in light of applicable law, the intent of the land trust, grantor or funder, the public's interest and the other amendment screening questions described in the Amendment Report.

How much change is too much? Wholesale changes to the purposes themselves, major changes to restrictions relating to one or more purposes or complete removal of one or more purposes would be inconsistent with the easement's conservation purposes in all but the most extraordinary case. Most easement practitioners consider removal or substantive alteration of a conservation purpose a high-risk area that falls outside the Amendment Principles and may require court or attorney general approval.

**Principle 6: The amendment is consistent with the documented intent of the grantor and any direct funding source.**

Land trusts undertake (whether ethically or legally) obligations to easement grantors and funders as part of the easement acquisition process. Additional obligations may arise from promises and representations made during negotiations of the transaction. If a grantor or funder specifies their intent to protect specific conservation values above others and receives written assurance that this intent will be honored, an amendment harming those values might be viewed as a betrayal. Whether that grantor or funder or their heirs could sue to enforce the stated intent would depend on multiple issues of federal and state law, but they could damage the land trust by generating unsympathetic news reports and sharing their story with prospective grantors and funders.

Grantor and funder intent is best found in the text of the conservation easement itself and in any funding documentation. With a well-drafted easement, there is no need to look beyond the easement itself and the clear import of its words. At the time the easement is signed, the intent of all parties, including the land trust, should be expressed fully and clearly in the written easement.

Ensuring that prospective grantors and funders are satisfied is critical to an ongoing conservation program. Land trusts should be cognizant of what they do and the decisions they make in all contexts, including amendment, in view of the public perception of their actions. Any doubt about intent and amendment might be addressed through meetings with prospective grantors and funders, writing explanatory newsletter articles or letters to neighbors of easement land when the land trust approves or, even in some circumstances, denies amendment.

**Principle 7: The amendment has a net beneficial or neutral effect on the relevant conservation values protected by the easement.**

Principle 7 addresses actual on-the-ground resources protected by the conservation easement and recognizes some flexibility. This principle acknowledges that some conservation values of an easement property may evolve over time, including, for example, species composition, habitats, recognized best agricultural practices, impacts of climate change or other features or circumstances present when the easement was conveyed. The phrase *relevant conservation values protected by the easement* requires a land trust to use its best judgment in determining what conservation values are present and relevant when the land trust determines the potential effects of the amendment in light of the other principles.

Principle 7 can involve weighing trade-offs among numerous positive and negative impacts of the amendment on the conservation values of the easement land, then making a judgment about the amendment's overall impact on those values, the written intent and the public interests served by the easement. Suppose a landowner proposes an amendment that would allow a minor expansion of an existing building envelope on the easement property while also increasing restrictions on another part of the easement property to enhance protection of important wildlife habitat. The land trust may or may not conclude that the effect of the amendment would be beneficial or neutral overall with respect to all of the property's conservation values and the public interests served. Again, the decision is a matter of scope and scale, requiring careful analysis and best judgment within the constraints of applicable law and in conformity with the grantor's documented intent.

If a less-than-neutral result is anticipated as to a conservation value protected by the easement, or may be perceived as such by third parties, the land trust must carefully consider the legal and public relations risks of amending. In some cases court approval may be needed if a less-than-neutral result is anticipated, unless the easement contains an amendment provision that grants sufficient flexibility for the particular amendment. This area of law is unsettled. It is essential to consult experienced legal counsel on a case-by-case basis, conduct a thorough risk analysis and proceed carefully.

The more controversial or questionable the conservation results, the more detailed the analysis and documentation must be to justify an amendment decision. If the conservation results are unclear or more subtle, land trusts should call in outside advisers—wildlife habitat experts or natural resource consultants, for



For accreditation, a land trust needs to document that its amendments are generally consistent with the above Amendment Principles. Specifically, accreditation focuses on Principles 4 and 7.

- A land trust needs to document that any amendment did not result in private inurement or impermissible private benefit. This documentation can include an appraisal, a letter of opinion from a qualified real estate professional, correspondence with legal counsel or a memo to the file.
- A land trust needs to describe how any amendment had a net beneficial or neutral effect on the protected conservation values.

A land trust will also need to describe how it involved any co-holder, in accordance with the terms of the easement deed or other agreement. In addition, the documentation needs to show that the land trust informed or involved its board, as appropriate to the scale of the amendment.

## ADDITIONAL RESOURCES

- *Amending Conservation Easements: Evolving Practices and Legal Principles*, 2<sup>nd</sup> Edition, Land Trust Alliance, May 2017.

## POLICY TEMPLATES

- Conservation Easement Amendment Policy, Sample 1
- Conservation Easement Amendment Policy, Sample 2

## STANDARD 11. CONSERVATION EASEMENT STEWARDSHIP

### J. Partial or Full Extinguishment

- 1. In the rare case that it is necessary to extinguish a conservation easement, in whole or in part,
  - a. Follow the terms of the conservation easement with respect to taking appropriate action, and obtain judicial or regulatory review when required by law or specified in the easement deed
  - b. Ensure there is no private inurement or impermissible private benefit
  - c. Take steps to avoid or mitigate harm to conservation values and/or use any proceeds in a manner consistent with the conservation easement deed
  - d. Consider the land trust's actions in the context of its reputation and the impact on the land conservation community at large

Accreditation indicator elements located at [www.landtrustaccreditation.org](http://www.landtrustaccreditation.org)

#### BACKGROUND

In rare instances, an easement may be extinguished (for instance, when a conservation holder merges fee and conservation easement interests). In some states, certain forms of extinguishment must be court-ordered or court-approved. To the extent possible, a land trust should ensure that the conservation values will continue to be protected on the land following an extinguishment or partial extinguishment or ensure that additional conservation action is taken. Land trusts should never consider extinguishment of an easement lightly. Extinguishment should only be an option of last resort. Land trusts should always consider the precedent that might be set and how extinguishment may affect the viability of the conservation easement tool itself.

## WHEN CAN AN EASEMENT BE EXTINGUISHED?

Because most conservation easements are designed to be perpetual, the question of how or when an easement can be extinguished is usually far from the minds of the landowner and the land trust. The subject, however, is an important one. There are rare and limited instances when a conservation easement might be extinguished. Land trusts can proactively plan for and help prevent many of these circumstances.

In addition to extinguishment due to condemnation, as described in [Practice 11I1](#), and due to *de minimis* boundary adjustments, as described in [Practice 11H3](#), there are several other ways in which an easement might be extinguished:

- *Foreclosure.* If there is a pre-existing lien on the property, such as a mortgage, mechanic's lien or lien for unpaid taxes, foreclosure of such a lien may allow a new owner to receive title to the property free of any conservation easement placed on the land subsequent to the date of the lien. Following the requirements of [Practice 9F2](#) will help a land trust prevent such an eventuality.
- *Marketable title acts.* Almost half of the states have marketable title acts providing that, after a certain term of years, restrictions on real property are automatically extinguished. Several states have statutes that specifically exempt conservation easements. Land trusts should have a policy of rerecording the conservation easement deed (or, at a minimum, a notice of the existence of the conservation easement deed with recording information and property location) if required by their state statute to ensure that the easement's restrictions are not invalidated.
- *Merger.* Under the law of most states, if the holder of a conservation easement becomes the owner of the restricted property, these rights merge, and the easement is automatically extinguished. If the easement is co-held or transferred to another holder *before* the original holder accepts the fee interest, merger will not take place.
- *Release.* A land trust might terminate a conservation easement through its own action. In practice, however, such a procedure would be undesirable. If important public benefits were lost as a result of the extinguishment, it might result in an inquiry or even a lawsuit by the state attorney general (see below). Moreover, it could cast doubt on the integrity of the land trust and on the use of easements. As a matter of policy, a land trust should not consider voluntarily releasing a conservation easement, even for compensation, except under the most extraordinary circumstances. In such a situation, the land trust should

follow the terms of the easement and consider obtaining an advisory opinion from a court or appropriate governmental agency, even if not required by law.

## THE LEGAL CONTEXT

### **Federal Law: IRC Section 170(h) and the Treasury Regulations**

For tax-deductible conservation easements, Internal Revenue Code §170(h) and the Treasury regulations §1.170A-14 apply. A land trust can only terminate or extinguish an easement via a judicial proceeding when changed conditions surrounding the subject property have made the continued use of the encumbered land for conservation purposes impossible or impractical. The land trust must be paid a share of the proceeds proportionate to the easement's value from a subsequent sale or development of the land, and the land trust must use the proceeds for similar conservation purposes. The land trust must also report and concisely describe all modifications to easements, including terminations, on the Form 990 (see [Practice 2C1a](#)).

Most conservation easements, regardless of whether an income tax deduction is contemplated, contain termination and proceeds clauses to satisfy these requirements. These clauses often outline the steps the land trust must take prior to releasing or extinguishing an easement and they almost always require judicial or regulatory review.

### **Federal Law: Private Inurement and Impermissible Private Benefit**

Federal tax law prohibits tax-exempt nonprofit organizations from disposing of their assets in ways that create impermissible private benefit or private inurement. This prohibition means that a land trust cannot participate in a full or partial extinguishment that conveys either a net financial gain to any private party unless that amount is insubstantial or necessary for accomplishing a greater public benefit. Furthermore, an extinguishment cannot provide any measurable benefit at all to a board or staff member or other land trust insider (other than fair compensation for services). A land trust that engages in impermissible private benefit or private inurement risks losing its tax-exempt status. See [Standard 4](#) for more information.

Land trust board members and staff often have little or no expertise in determining the financial ramifications of a proposed extinguishment. Accordingly, if there is any concern as to impermissible private benefit or private inurement, the land trust should consult an experienced conservation tax law attorney, appraiser and other advisers, then obtain or create appropriate documentation to



help establish that no private inurement or impermissible private benefit resulted from the transaction. Documentation might include appraisals or other contemporaneous evidence (such as a letter of opinion from a qualified real estate professional, correspondence with an attorney, board materials, memos to the file and so forth) appropriate to the scope of the activity and the scale of the extinguishment.

### **State Law: Conservation Easement Enabling Statutes**

Every state except North Dakota has enacted some form of perpetual conservation easement enabling statute. A clear majority of these statutes do not explicitly restrict amendments or terminations, in whole or in part. In fact, only 13 of the 50 statutes provide any procedural or substantive restrictions at all. And, of these 13, only four can arguably be said to provide any sort of comprehensive approach to the issue.

Some states have anticipated that issues may arise with respect to termination of conservation easements, and several statutes, as well as the Uniform Conservation Easement Act, provide that they may be terminated “in the same manner as other easements.” Other state statutes are silent on the question, and therefore, preexisting legal doctrines apply, including the charitable trust doctrine.

### **State Law: Laws Governing Charitable Organizations**

All 50 states have laws governing the activities of charitable nonprofits formed under their laws or operating within their jurisdictions. These laws seek to ensure that charities operate in accordance with their governance documents, honor the intent of their donors and fulfill their public purposes. A division of each state attorney general’s office usually has oversight of charitable organizations, although some states assign these responsibilities to other agencies.

Most land trusts are charitable organizations, and the conservation easements they hold might be characterized as charitable assets conveyed for specific charitable purposes. Some authorities believe that conservation easements constitute restricted charitable gifts or *charitable trusts* subject to state charitable trust law. Where conservation easements are considered charitable trusts, a land trust may have limited discretion to amend or extinguish conservation easements without court approval and without involvement of the state attorney general or other officials, regardless of whether the grantor took a federal tax deduction.

## EXTINGUISHMENT RISKS

In addition to legal considerations, the land trust should very carefully consider the potential impact of extinguishment on its own reputation and that of land conservation in general. The reputational risk of removing land from an easement is very high when the public believes conservation easements to be perpetual. Prior to an extinguishment, it is wise to consult with stakeholders, such as the original donor (or heirs), neighbors, nearby community members, land trust members and funders. While judicial approval might protect the land trust from legal challenges to an extinguishment, if the extinguishment is controversial and opposed by members of the community, the land trust's long-term strength and viability could be compromised.

## WHAT'S A LAND TRUST TO DO?

Conservation experts differ as to what legal doctrines apply. Everyone can cite authority to support their arguments. For land trusts, it comes down to ensuring the integrity of land conservation and public confidence in land trusts with every potential extinguishment or partial extinguishment. Therefore, land trusts should follow these practical and important steps:

- Consult with a qualified attorney and follow the terms of the conservation easement when taking action
- Check applicable state statutes and common law to know how a conservation easement is treated in your state and whether the land trust needs to seek the review of the state attorney general or court approval
- Take steps to avoid or mitigate harm to the conservation values protected by the easement
- Consider the potential impact of extinguishment on the land trust's reputation and on that of the greater land trust community
- Ensure there is no private inurement or impermissible private benefit
- Use any proceeds in a manner consistent with the conservation purposes of the easement
- Fully document all actions and decisions



For accreditation, a land trust needs to describe instances where it extinguished a conservation easement in whole or in part. Partial extinguishments include when restrictions are released on a portion of conservation easement-protected land in exchange for conservation easement restrictions on land not previously protected (often referred to as *swaps*).

A land trust will need to document how it managed any extinguishment actions, including the following.

- The land trust either (1) followed the conservation easement terms with respect to obtaining judicial or regulatory review or (2) obtained a written legal opinion why the land trust did not need judicial or regulatory review.
- The land trust documented that the extinguishment did not result in private inurement or impermissible private benefit. This documentation can include an appraisal, a letter of opinion from a qualified real estate professional or correspondence with legal counsel.
- The land trust took steps to avoid or mitigate harm to the conservation values.
- The land trust used any proceeds appropriately.
- The land trust's actions did not put the land trust's or the land trust community's reputation in jeopardy.
- The land trust informed or involved its board, as appropriate to the scale of the extinguishment.
- The land trust involved any co-holder in the extinguishment, according to the terms of the conservation easement or other agreement.

The Commission is unlikely to review documentation for a *de minimis* extinguishment, such as a minor boundary line adjustment (see Practice 11H3). Whether the extinguishment is *de minimis* depends on the facts and circumstances of the situation. The factors the Commission considers include the total amount of land released, the amount of land released in relation to the overall property size, the purpose and significance of the action, the potential for impermissible private benefit or private inurement and how often a land trust engages in these actions.

- The land trust informed or involved its board, as appropriate to the scale of the extinguishment.
- The land trust involved any co-holder in the extinguishment, according to the terms of the conservation easement or other agreement.

The Commission is unlikely to review documentation for a *de minimis* extinguishment, such as a minor boundary line adjustment (see [Practice 11H3](#)). Whether the extinguishment is *de minimis* depends on the facts and circumstances of the situation. The factors the Commission considers include the total amount of land released, the amount of land released in relation to the overall property size, the purpose and significance of the action and how often a land trust engages in these actions.

# Standards and Practices

## STANDARD 12. FEE LAND STEWARDSHIP

### B. Land Management and Stewardship

- 1. Develop a written land management plan for each conservation (■) property within 12 months after acquiring the land to:
  - a. Identify the property's conservation values, including any significant cultural and natural features or those that have significant community value
  - b. Identify the overall management goals for the property
  - c. Identify activities to achieve the goals and to reduce any risks or threats to the conservation values
  - d. Specify the uses that are appropriate for the property, in keeping with the property's conservation values, any restrictions and donor or funder requirements
    - i. Provide public access opportunities as appropriate to the property and the land trust's mission\*

\*Not an accreditation indicator element

Accreditation indicator elements located at [www.landtrustaccreditation.org](http://www.landtrustaccreditation.org)

## WHY DEVELOP A LAND MANAGEMENT PLAN?

A written management plan is essential for each land trust property, no matter how small. A management plan identifies the resources and processes on the land that are to be protected and promoted, determines what actions to take or avoid and designates who shall accomplish those objectives. Land trust properties need a management plan for the following reasons:

- **To protect resources.** The land trust needs to know what resources are on the property and determine how to manage them: scenic views may need to be maintained; rare plants may require special protection; or wildlife habitat may require active management. Failure to locate these resources may mean not only that they are not adequately managed, but that the land trust may inadvertently damage them.
- **To communicate management objectives within the land trust and to future managers.** If the land trust does not have an overall management philosophy and a well-thought-out plan, the care of its properties may be subject to the whims of a few energetic board members. For example, one land trust had an over-enthusiastic board member who took it upon himself to bulldoze a new road on a property! Another land trust started forestry projects that were later abandoned—now it has lots of overgrown Christmas tree plantations. Without strategic planning, a land trust may waste critical resources, create problems for future managers and threaten the integrity of a property. The plan is an essential long-range guide for ever-changing land trust boards, staff and professional land managers.
- **To control damaging uses.** The management plan must address public use. If the land trust does not manage for public use, the public will continue its traditional uses of the property. People may create their own parking areas. One land trust had people blaze trails without the organization's permission. Another had difficulty making trespass accusations stick because it had never determined permissible uses for the property.
- **To build public support and credibility.** A management plan also helps build public support for a land trust property. Town officials are certain to ask how the organization will use the land when considering property tax exemptions; a well-considered response based on the plan will enhance the land trust's credibility.

## WHEN TO PREPARE THE PLAN

A management plan should be prepared as soon as possible, ideally before the land trust acquires the property, but the goal should be to complete the plan within 12 months of ownership.

Sometimes natural and biological resource inventories, stakeholder meetings and consultation with experts will take longer. In these cases, an initial management plan would include the known attributes of the property and specify the data collection work and tasks still to be done and a schedule for completing a more detailed plan.

Land trusts may need to implement start-up stewardship practices, such as marking boundaries, dealing with serious hazards, erecting signs and monitoring the new property before inviting the public to use the land. In general, land trusts should delay other activities on the property until the plan is prepared. Owning a new property generates enthusiasm for ways to use it, but it is important to identify the natural and cultural resources thoroughly and their protection needs before adding improvements such as trails, parking areas or kiosks.

Land trusts should update management plans if they add new parcels to the property, if the plan is significantly outdated or if the plan no longer reflects conditions after significant natural or human-caused changes.

∞ For accreditation, a land trust needs to complete a management plan within 12 months of acquiring a conservation property. Similarly, if a new parcel is added to an existing property, the land trust needs to update the management plan to reflect the parcel addition within 12 months of acquiring the parcel. The land trust can incorporate the new parcel into the management plan by updating the maps or by adding the new property information. The Commission also requires updates to relevant sections of the management plan when there are significant changes to the conservation values or natural features resulting from an event like a wildfire or hurricane. Depending on the nature of the changes, the updates may be to sections on conservation values, management goals, activities to achieve those goals or to maps.

## WHO PREPARES THE PLAN

Proper stewardship of its properties is a basic responsibility of a land trust. The land trust board sets policies and satisfies itself that it has consulted appropriate experts when necessary. The board has the final responsibility for overseeing the management plan, but in cases where a land trust has staff, the staff usually oversee the actual stewardship activities and management plan implementation in accordance with board policy. A wide array of people, however, can help the land trust develop and carry out the stewardship policies and individual plans.

- **Stewardship committees.** Many land trusts have a stewardship committee that helps set stewardship policies and oversees their implementation. A stewardship committee usually includes knowledgeable persons such as lawyers, scientists, foresters, government agency personnel and informed community members who can provide valuable skills. Land trusts

can draw committee members from the board, general membership, staff and conservation professionals. Members of the stewardship committee should be knowledgeable about the purposes and policies of the land trust.

Statewide or regional land trusts with dispersed properties may form local stewardship committees to assist in preparing management plans, developing yearly work plans and budgets and property inspections (see [Practice 12C](#)). Such committees can also help supervise improvements and restoration projects on the property.

- **College students/classes.** Some land trusts have had success using graduate students, who can sometimes write a management plan as a thesis or term project. Developing a plan may also serve as an excellent project for a university class on resource management.
- **Public agencies.** The [Natural Resources Conservation Service](#), U.S. Department of Agriculture, has prepared conservation plans for some land trust properties, especially agricultural lands. State cooperative extension services may also be available to help the land trust with natural and cultural resources inventories.
- **Consultants.** The land trust might hire a qualified consultant to prepare the plan or parts of it, especially if it involves special resource management, such as rare plant protection, ambitious habitat restoration or forestry management.
- **Specific volunteer help.** Land trusts have been successful in getting volunteer help with developing or implementing their management plans. Foresters can do boundary marking and plant inventories. Local orienteering or geocaching clubs may make trail maps for local preserves. Boy Scouts, especially Eagle Scouts, have done great work for land trusts over the years. Girls Scouts working on their Gold Awards could also be a good resource.

Other possibilities include hiring summer interns or part-time, year-round help to do the legwork, research or to help write the plan.

## TYPES OF PLANS

Plans can range from simple and straightforward (a few pages) to complex documents that are more than a hundred pages. Plans can be based largely on the general type of habitat (forest, grassland, wetland, agricultural and so on), but should be property-specific. Land trusts usually write plans for individual properties, but a land trust may have a master plan for contiguous parcels if there is clear identification of which parcels the plan addresses. If specific parcels have unique conservation values (such as varying plant communities) or parcel-specific restrictions (such as



public access), then those should be described in the master management plan. Land trusts that engage in resource management activities on lands they own, including forest management, farming, ranching and similar activities, should ensure that the management plan captures the appropriate information.

The type of management plan should be based upon the mission of the land trust and the characteristics of the property. Management plans for nature preserves will be different from those for agricultural lands or sites that the land trust administers primarily for public use (hiking and other nondestructive recreation). Some plans will have a significant programmatic component (for example, environmental education or interpretation), while others will be primarily resource-based. Plans can range from short-term (interim) versions to complex, long-term blueprints for future modifications and improvements. The exact type of management plan generated should fit with the resource and programmatic goals of the organization.

## Common Elements

At a minimum, management plans should identify the property's conservation values and describe the management goals and specific activities to achieve the goals. They may also include the following:

- The size, location and other physical facts about the property
- A description of the resources at the site (inventory information), including identification of the property's conservation values and potential threats to those values
- The land trust's goals and objectives for the property
- Opportunities and activities to achieve those goals and reduce any threats to the conservation values
- A description of the uses that are appropriate for the property, including a summary of any restrictions that came with the property or that the land trust has placed on the property
- An action plan for implementation, including a work plan, budget and a system for monitoring progress



For accreditation, every *conservation property* must have a management plan that includes the following:

- Date of plan or date when an update was completed
- Identification of conservation values (such as cultural, natural or community values)

- Management goals
- Activities to achieve management goals

A *conservation property* includes conservation lands held in fee for perpetuity, even if “forever wild” or not actively managed; conservation lands held in fee for donation, sale, transfer or sale to a public agency or other conservation group; and conservation lands held for sale subject to a conservation easement. If the land trust holds the conservation property less than 12 months, then a management plan is not required for accreditation. If the landowner retains a life estate, the land trust does not need a management plan until it receives the remainder interest in the property.

The required contents listed above give a land trust the flexibility to scale the type of management plan documentation to the type of property. For example:

- The management plan elements for a property that will be transferred to a public agency shortly after one year could be found within the materials provided to the board before project approval or the plan elements can be created using a summary table.
- Management plans must have sufficient detail to effectively protect and manage the property (such as maps with location of key property features or specific activities, summaries of restrictions or donor/funder requirements that inform uses, maps that show property location and boundaries). For example, a management plan for a property with active forestry will need to be more extensive or incorporate annual work plans to accurately reflect the management goals and activities.
- If the conservation property is under lease, then the lease can serve as the management plan, as long as it includes the above contents. (If it does not, the land trust will need to supplement the lease with the missing information).
- A master management plan can cover contiguous parcels if the plan clearly identifies which parcels it addresses. The plan can identify the parcels on a map, with a list or with written descriptions. If specific parcels have unique conservation values, then the land trust should identify these in the master management plan. A master management plan can cover properties that are not physically connected if the landscape is relatively uniform and there are no significant threats on the intervening parcels.

## IDENTIFYING THE PROPERTY’S CONSERVATION VALUES

Every management should contain an inventory, whether from detailed scientific investigation, a collection of existing data or observations made during the acquisition process, to identify the property’s conservation values.

- **Natural resources.** An inventory of the physical and biological resources is essential to protecting and maintaining a conservation property. The extent of an inventory depends on the type of resources the property contains and the intensity of proposed management

activities. A natural resources inventory may include plant and animal species lists, plant community descriptions, wildlife habitat limitations and boundaries, geologic and hydrologic features, soils descriptions, forestry surveys, aquatic or marine resources and climate data.

- **Cultural resources.** In addition to biotic and abiotic resources, land trusts need to consider the property's cultural resources, which include both possible artifacts of previous human occupation as well as buildings, roads and other structures. Federal and state law usually mandate cultural resource reviews of sites that receive public funding. In addition, there may be other situations that require the land trust to obtain permits, such as for excavation or the construction of trails. Check with the appropriate archaeological survey office to determine what you need to do.
- **Community values.** Many sites have become "places of the heart" for local residents because of their beauty, wildlife viewing opportunities, cultural features or other special attributes. An old-growth forest of Douglas fir in the West or white oak in the East might be such a place. The land trust should try to accommodate traditional uses, such as a swimming hole or hiking trail, where reasonable, unless such uses jeopardize the conservation values of the property.

These inventories may be based in part on existing management plans created for the previous landowners, surveys, inventories by public agencies (for example, Natural Heritage Inventories) maps and other records. When a property is large and the goals of the organization require detailed biological or ecological inventories, the plan should identify what additional information the land trust will gather and when the plan will be revised to reflect the new information.

## IDENTIFYING MANAGEMENT GOALS FOR THE PROPERTY

The plan should state the overall management goals for the property and make clear the priorities among them. These goals and priorities serve as a guide to future decisions and the development of annual work plans.

Typical management goals follow. Specific objectives may vary depending on the property, but the following considerations are common to all properties:

- **Resource protection.** The first management goal should be to carry out the conservation purposes for which the land trust acquired the property. An objective may be to preserve and protect the natural ecosystem of the property. To achieve this objective, the land trust

may specify various actions, such as controlling off-road vehicle use or undertaking prescribed burning, to achieve the goal.

- **Extended protection plans.** A second goal may involve looking at the big picture: Do surrounding properties need to be protected in order to protect the target resources over the long term?
- **Public access.** The plan should identify public use objectives (see below). The land trust should take a careful look at each property to see what type and amount of public access is appropriate so that over the long term the quality and significance of the property will not be damaged. For example, a land trust might close a bat cave to the public or limit visitation to a Civil War battlefield to daylight hours.
- **Productive uses.** Land trusts may be responsible for properties that include productive lands—lands that have some type of income-generating asset, such as farmland, gravel deposits or forestland. Allowing such productive uses may be consistent with or beneficial to the land trust’s conservation goals; they may help maintain an ecosystem or successional state, control deer populations, maintain a desired viewshed or serve as a demonstration area for model farm or forestry practices. In other instances, such activities may interfere with the conservation values of a property. Land trusts should consult with appropriate professionals to determine the effect of such activities before making them a part of the management scheme. Land trusts should also be aware that income from such activities could be subject to unrelated business income tax.
- **Annual obligations.** It should be a management goal for all land trusts to meet their annual obligations in a timely fashion. Such obligations include payment of taxes and liability insurance, filing federal tax forms, budgeting, developing yearly work plans, keeping accurate records and inspecting their properties (see Practices 12B3 and 12C).
- **Stewardship policies.** If the land trust has established a set of stewardship policies that apply to all of its properties, such as any general policies it has on public use, property taxes, fire control or plant collection, the land trust should reference these in the plan and adapt them as necessary to the special circumstances of each property.

## IDENTIFYING ACTIVITIES TO ACHIEVE THE GOALS

These activities will include the actions taken by the land trust to accomplish the goals and objectives in the management plan. It is often prudent to include a statement about who will do the action and the timeframe for completion. For example, a management plan for a property

acquired with a history of good forest management and substantial timber resources, where the goals are to protect open space and habitat and to demonstrate sustainable forestry, might have the following activities: periodic timber inventories; stand delineations and mapping; prescriptions for forestry activities and their timing; evaluation of access opportunities; post-harvest clean up; and public education events or opportunities.

Actions taken on land trust properties can range from proactive measures, such as intensive restoration efforts, to doing nothing. Although many conservationists once advocated the concept of “letting nature take its course,” climate change, exotic species invasions and human influences on ecosystems reduce the feasibility of this strategy. Active management often includes more intensive manipulation of a site by restoration and rehabilitation activities. Passive management is less proactive but still would require certain basic activities, such as site inspection, addressing any management problems (such as trespass, overuse or vandalism) and protecting the property’s conservation values.

## THREATS TO CONSERVATION VALUES

The land trust should consider the threats to conservation values and develop actions to address them. For example, fire or fire suppression is often a threat to ecosystem processes, and the land trust should consider the historical frequency of fire in similar communities, current fuel load, capacity to control wildfire, existence of fire lanes and other aspects of wildland fire potential and the ability to conduct prescribed burns. Crown fires resulting from excessive fuel load may create significant stress in a forest community. In many cases, land trusts lack the training and experience to manage fire; they may form alliances with federal or state agencies or private consulting firms.

Another threat to conservation values is the alteration of historical water regimes that either increases or decreases the wetness of the site. Most wetland plants have a preferred hydroperiod (the depth and duration of saturation or inundation). Determination of the desired future condition (wetter or drier) can guide the hydrologic alteration (for example, removal of tiles or levees, installation of water control structures and so forth).

Feral animals, such as cats, dogs, pigs, goats and numerous other domestic animals, can cause threats to plants and wildlife. Many organisms, such as zebra mussels, have been accidentally introduced and now threaten native species. Native species can also be a threat. For example, native pine bark beetle can cause significant damage to forests that may require some removal of hazards and reduction of fuel load for wildland fire management.

Invasive plant species can outcompete and threaten native species by using light more efficiently (for example, growing early or late in the season), nutrients, water (for example, salt cedar in western states) or other resources. In worst-case scenarios, the invasive plants can establish a monoculture that provides limited habitat and food resources for native wildlife. Methods of control of invasive species include herbicide application, mechanical removal, grazing or herbivory or some combination.

Humankind, including encroachment, unauthorized access, off-road vehicle use, dumping and damage or erosion due to overuse of trails or other property features, may pose other risks to the conservation values. The management plan should include actions to address or minimize the most significant risk or threats to the property's conservation values.

## **PERMITTED AND PROHIBITED USES**

Land trusts protect conservation values (in part) by determining what activities they will permit on their properties. This determination is an important part of developing a management plan. An early step in this process is to identify the critical natural resources on the site (for example, rare/threatened species, high quality streams, prime farmland and so on). Once these priorities are set, the land trust can develop a list of permitted activities that do not harm the property's conservation resources and are consistent with any property restrictions.

### **Public Access**

Many land trusts feel it is important to their mission and the long-term success of land trusts to open land trust properties to the public. Providing public access opportunities, as appropriate to the property, the land trust's mission and the organization's resources, acknowledges that land trusts, as public charities, create a public benefit. In some situations, such as where land is critical habitat for a threatened or endangered species, the public benefit may be entirely related to the protection of the species. Nevertheless, in many situations, public benefit goes beyond the protection of conservation attributes that create a healthy environment for wildlife, scenic views or clean air and water and extends to providing opportunities for public outdoor recreation and education.

Where the land trust's mission includes providing community benefits, the management plan should seek to identify how the property can accommodate reasonable public use while protecting its conservation values. Providing trails, shelters, allowing hunting and fishing, creating venues for outdoor community events, establishing community supported agriculture programs and hosting

community gardens are all activities that could be appropriate on land trust properties, based on careful management planning and engagement with community stakeholders.

The level of public access (which can range from closure to being completely open) should be determined early in the planning process because it affects decisions about prohibited public uses. On most sites, the land trust may provide a list of allowed activities, which typically is shorter than a list of those prohibited but provides guidance to visitors in a more positive manner. Typical allowed uses might include daytime, low-impact activities, such as hiking, photography, canoeing or cross-country skiing. The land trust could also consider higher impact activities, such as camping, mountain biking or horseback riding and large group events, if appropriate. The land trust should spell out in detail a property's allowed uses. If a request is made for a specific use not covered by the current policy or land management plan (such as geocaching, research or special events), the land trust can determine the activity's appropriateness and update the management plan to provide clearer guidance. Clarity about permitted and prohibited uses is helpful to both staff and visitors.

## IMPLEMENTATION PLANNING

After collecting relevant information and developing management goals, objectives and a work plan, the land trust's next task is to implement a plan that addresses the conservation priorities of the site. The land trust can usually sort action items into relatively short-term (one to two years) and long-range tasks. Restoration projects that require obtaining and increasing local native seeds and starts (for example, potted plants) may require five to ten years to accomplish. The land trust should prioritize action items based on their importance and the resources available to accomplish the task.

The implementation plan should also include a budget and a system for monitoring progress to achieving the goals outlined in the land management plan.

# Standards and Practices

## STANDARD 12. FEE LAND STEWARDSHIP

### C. Inspecting Land Trust Properties

- 2. Inspect properties at least once per calendar year for potential management problems and promptly document the inspection

Accreditation indicator elements located at [www.landtrustaccreditation.org](http://www.landtrustaccreditation.org)

#### THE IMPORTANCE OF INSPECTING FEE-OWNED LAND

A land trust that holds property also takes on a responsibility to the public and has certain legal liabilities for injuries that occur on the land. Thus, at a minimum, a land trust needs to inspect each property at least annually to ensure it is not damaged by malicious or negligent acts, that people are not endangered by safety hazards and that continuous encroachment or unauthorized uses do not cause the land trust to lose the property or parts of it altogether. Such problems usually can be prevented if the land trust marks and maintains its boundaries (see [Practice 12C1](#)) and regularly inspects its properties.

#### INSPECTION POLICY AND PROCEDURES

Each land trust should have a policy or procedures for inspection of conservation properties. This document should identify who is responsible for the inspection, the frequency of inspection and procedures for completing and processing the inspection report, including actions to be taken in case the land trust discovers any management or other problems. The policy or procedure should also describe the desired contents of property inspection reports, which should be completed soon after the inspection visit and filed according to the land trust's recordkeeping policy (see [Practice 9G](#)).



## Who Should Conduct Inspections?

Land trusts should determine who is responsible for property inspections and supervision. A member of the land trust's stewardship committee, a volunteer or a staff person can conduct the inspection. This person should be:

- Thoroughly familiar with the property information, management plan and yearly work plan
- Committed to upholding the land trust's stewardship policies
- Physically fit and comfortable working alone or in small teams in remote natural areas (or whatever conditions exist)
- Trained to recognize change, trespass or encroachment and possible management improvements on the property or acquisition opportunities on adjacent lands
- Trained in proper safety procedures

If volunteers or consultants conduct a portion of the inspection, they should be properly trained, and their work should be reviewed by the person responsible for supervision. It is also helpful to have written expectations and a step-by-step guide as to what should be done and how to handle problems that arise. On properties where there is extensive public use, an inspector should be coached on how to interact with and educate visitors about inappropriate uses. Often inappropriate uses can be best corrected by someone with a friendly, nonthreatening demeanor. However, an inspector should be briefed as to when it may or may not be appropriate to intercede.

Many land trusts use site stewards to perform or assist with inspection activities. The stewards are often land trust members who live close to the site and can visit the property frequently. If this strategy is used by the land trust, clear guidance should be provided relative to the stewards' responsibilities and limits. For example, the Society for the Protection of New Hampshire Forests has a Land Steward program that specifies the qualifications, responsibilities and benefits of performing stewardship, including inspection, reporting vandalism, maintaining gates and signs and related tasks. Stewards receive a complimentary Forest Society membership and tuition reimbursement for required training, as well as the opportunity to "get to know a beautiful piece of open space intimately, in all seasons."

Ideally, inspections should be conducted with two or more persons, for safety reasons. At a minimum, one other person in the organization should be informed when an inspection is to take place. Inspectors should bring a cell phone or two-way radio and have the number of someone to call in case of emergency.

## How Often Should a Land Trust Inspect its Properties?

A land trust must inspect its properties regularly — at least once per calendar year and often more frequently. Properties open to the public or adjacent to densely populated areas may require daily or weekly inspection or even an on-site presence by the land trust. In other situations, such as when timber harvesting is occurring on adjacent land, the land trust may need to check the property several times a week during the logging operation. Because each property is unique, the frequency of monitoring will vary. Some land trusts determine how often and include this information in the management plan. If a property is being inspected more than once a year, it may make sense to designate one site visit as the formal annual inspection, with a full review of the entire property and documentation of the condition of the land and infrastructure. Other site reviews could then focus on the status of specific issues or resources, and documentation could be limited to those items. Some land trusts inspect at least quarterly so that they can cover seasonal activities.

## What Should the Inspection Include?

A property inspection involves:

- Looking for threats to conservation values
- Observations related to the property's condition and conservation values
- Checking boundaries
- Noting trespass and associated problems
- Noting numbers, dates and types of visitor use
- Checking the condition of structures or hazards
- Observing uses of adjacent property
- Being attentive to the inspector's personal safety

Land trusts may need to monitor important biological features for certain plant species or communities, as required by the management plan. Photo documentation of biological features or heavy use areas may be necessary to assess impacts of human usage over time. Photo locations should be carefully documented, and photos should be dated, labeled and signed and stored according to the land trust's recordkeeping policy.

Large properties pose a special challenge to monitors because it could take weeks to travel the boundaries by foot to check for natural or manmade changes and unauthorized use. In such cases, land trusts may concentrate their surveillance to areas with more intense use, a history of problems or ready access from neighboring lands.

Inspection of working lands can include observation of the health of crops, insect and pest problems, soil erosion, drainage issues, weed pressure and related factors. If livestock is part of the operation, condition of fencing and amount of grazing available are of interest. On irrigated lands, observation of water supply and soil moisture are important. Forest inspection can include volume of timber available for harvest, fuel load, pest problems and other resource issues. At the end of the season, the land trust will likely benefit by obtaining production information on crop yields, animal-grazing days, timber logging or other income-producing harvests.

### **How Should a Land Trust Document the Inspection?**

A form or checklist makes it easier for land trust personnel to inspect the site and generate a report with a format that is consistent over time. A land trust should have a standard inspection form that contains at least the following elements:

- The inspection date
- The name of the property inspected
- Name of the inspector
- Observations related to the property's condition and conservation values
- Observations related to any potential property ownership challenges

The form may be customized to the needs and resources of specific properties and to their respective management plans. For example, a property with an endangered plant species may have indicators of the species' health included on the form for that property.

The written inspection reports, combined with the management plan, can help the land trust develop the following year's work plan and budget for the property. Inspectors should indicate what future actions should be taken on the property and provide suggestions about their implementation. Inspection reports should be dated and signed by the person who inspected the property (or, at a minimum, include that person's name) and should be completed soon after the inspection visit. Items that require immediate action, such as the removal of a safety hazard, should be flagged and promptly discussed with the person who manages conservation fee land inspections

and ultimately the board, if appropriate. Upon completion, the reports should be reviewed by appropriate land trust personnel and filed according to the land trust's recordkeeping policy.

∞ For accreditation, a land trust needs to document one inspection of each conservation property each calendar year using an inspection report. A conservation property can include multiple parcels; nevertheless, the land trust only needs one inspection report. However, the inspection methodology the land trust uses needs to be able to identify *conservation property ownership challenges*. *Conservation property ownership challenges* include significant trespass, encroachments and adverse possession claims.

A land trust needs to complete the inspection report promptly after the inspection visit. The land trust should not consistently have a gap of greater than three months between the inspection date and when the report is completed. The inspection report must include the following:

- Inspection date
- Property inspected
- Name of the inspector
- Observations related to the property's condition and conservation values
- Observations related to any potential *conservation property ownership challenges*
- Report completion date

# Standards and Practices

## STANDARD 12 FEE LAND STEWARDSHIP

### C. Inspecting Land Trust Properties

- 3. Address management problems, including encroachments, trespass and other ownership challenges, in an appropriate and timely manner and document the actions taken

Accreditation indicator elements located at [www.landtrustaccreditation.org](http://www.landtrustaccreditation.org)

#### WHY ADDRESS ISSUES IN A TIMELY MANNER

Land trusts may face a broad suite of management problems that, left unchecked, can lead to long-term damage and possibly loss of property. Therefore, it is essential for land trusts to address problems in a timely manner.

- *Encroachment.* Laws vary from state to state, but encroachment, such as road construction, land clearing or use, timber theft, borrow pit extraction, dumping or squatting that is not addressed in a timely manner may be subject to a statute of limitation for complaint and corrective action. Thus, it is the owner's duty to be aware of trespass or unauthorized activities so that the land trust can make a proper response. In some states, long-term squatting can result in the visitor making a claim to the property.
- *Trespass.* Use of conservation property that is inconsistent with the management plan and guidelines of the land trust can lead to significant natural resource damage or could result in the land trust inadvertently granting an impermissible private benefit to the trespasser.
- *Other management issues.* Land trusts' management plans should identify activities to achieve the overall management goals for the property and to reduce any risks or threats to the conservation values (see [Practice 12B1](#)). Addressing problems early can reduce negative impacts to conservation values, which can ultimately save the land trust time and resources.

## PROCEDURES TO RESPOND TO MANAGEMENT PROBLEMS

Most management problems are identified through the annual inspections of conservation properties (see [Practice 12C2](#)). A prudent land trust will also pay attention to activities on neighboring properties, as well as its own, so that the organization can guard against disturbances that cross the land trust's boundaries, such as logging, bulldozing or other activities that can diminish conservation values. Many land trusts develop a policy or procedure to ensure that, if a violation is observed, the land trust is prepared to respond quickly and effectively to limit damage. This policy or procedure should identify who in the organization is responsible for dealing with management problems, who should contact the offending party (if the perpetrator is known), who should report the issue to police or other appropriate office, how issues should be addressed and who will document the actions taken to address problems. Current contact information for police, fire, conservation officers and other emergency services should be maintained in the land trust office. Inspectors who encounter unauthorized activity should be cautious about confronting the perpetrator and follow the land trust's procedures for dealing with violators and general safety practices.

- *Encroachment.* Land trusts should deal immediately and forthrightly with any encroachment on their property. Encroachment problems may include timber harvesting, grazing, road building, dredging, construction, dumping and squatting. Understanding property boundaries (see [Practice 12C1](#)) and having them marked appropriately will help inform neighbors and others of the land trust's property. In cases where property rights or other legal problems exist, the land trust should seek an attorney's opinion about what action is appropriate. Generally, it is preferable to negotiate with the party responsible for the problem, but the land trust needs to be prepared to litigate if necessary to protect its properties and its standing. Therefore, it is important to have a legal defense fund and maintain relationships with qualified lawyers.
- *Trespass.* This varies depending on the allowed uses of the property. Examples include hunting, building hunting stands, ATV use, mowing, camping, bonfires and so on. Ensuring boundaries are marked and the rules of the property are posted help improve the understanding of what is and is not allowed, ultimately building better relationships with users. Activities that are illegal can be reported to police, and other activities may require legal advice to ensure that the land trust operates in accordance with the law.

- *Other management issues.* Examples include damage resulting from storms, insect infestations, fire, flooding and so forth. Land trusts should make conscious decisions regarding any appropriate response. Often such issues may require consultation with outside experts to determine the best course of action and whether remedial action is appropriate or possible. Stewardship events at specific properties are often held as a way to enlist volunteers to help address problems such as invasive species or clearing from storm damage.

## HOW TO DOCUMENT PROBLEMS AND ACTIONS

It is essential that the land trust carefully document all observations of management problems in a timely manner and retain the records consistent with the land trust's recordkeeping policy (see [Practice 9G1](#)). The documentation can be a memo to the file, an inspection report, minutes of board or committee meetings, a video or an entry in a database. In the event a problem requires law enforcement or potential legal action, it is especially important to document all actions taken, as well as any responses received from third-parties. In addition to potentially needing them for legal action, having photographs of the problems aids in keeping others in the organization informed, such as committees and the board, and helps document progress in addressing the problems.

When events occur that have substantial impacts on the management goals and objectives for the property, the land trust should review the management plan and make adjustments as necessary.



For accreditation, a land trust needs to document how it addresses any *conservation property ownership challenges*. *Conservation property ownership challenges* include significant trespass, encroachments and adverse possession claims. The documentation needs to show that the land trust's actions were timely, were consistent with the conservation values and/or any restrictions on the property and did not result in private inurement or impermissible private benefit.