

**D09: The Use of Conservation Easements in
Adapting Conservation to a Changing Climate**

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Practical Pointers Series

CLIMATE CHANGE IMPLICATIONS FOR CONSERVATION EASEMENTS

Changes in climate are now apparent across the nation and are already affecting the nation's lands, waters, wildlife and communities. These impacts are expected to increase, threatening past conservation achievements and making future conservation actions all the more important to helping habitats, landscapes and our communities successfully adapt to climate change. Future climate change and its impacts depend on the choices we make over the next few years. Land conservation is one of the most important and cost effective ways to help the lands and resources we love adapt to changes in climate. By considering the impacts of climate change within their normal land conservation activities, land trusts can provide strategic conservation investments.

How is our climate changing?

- Changes in climate are well documented in the U.S. and around the world including rising temperatures, increasingly heavy downpours, rising sea level, longer growing seasons, reductions in snow and ice, and changes in amounts and timing of river flows.
- These changes are due primarily to human-induced emissions of gases that have trapped heat and driven increases in global temperatures over the past 150 years.
- These changes are expected to continue, with larger changes resulting from higher emissions and smaller changes from lower emissions.
- Climate changes are happening quickly compared to the past, raising concerns about the ability of species, habitats, ecosystems and communities to respond and adapt.

How will climate change impact the lands and communities we love?

- Climate change will vary by locality, but many parts of the U.S. are expected to be hotter and drier, sea levels will rise and erosion will increase from more intense storms.
- Species distribution, the condition of natural habitats and agricultural lands, and conservation strategies of government and non-government organizations will be affected.
- Rising temperatures and declining snowpack are reducing summer stream flows threatening salmon and other cold-water fish; increasing wildfires, insects and species shifts pose challenges for forests and other landscapes; sea-level rise increases erosion and land loss, threatening coastal habitats and communities and changing agriculture and other businesses.

Safeguarding The Places We Love in a Changing Climate

1. **Identify the conservation values** that warrant protection, recognizing that some may change over time. Consider how climate change may affect the conservation values.
2. **Be deliberate about conservation choices and the science that underpins those choices.** Opportunistic conservation may serve us less well than in the past. Have a conservation plan with clear goals about how to address climate changes.

3. **Prioritize connectivity and critical habitats.** As habitats and ecosystems change with changing climate conditions, it will be important to prioritize investments that increase connectivity between major landscapes of native habitat, and protect critical areas.
4. **Examine each parcel in its landscape context** as it relates to other conserved or protected land, known species and other resources that are on or adjacent to the land.
5. **Understand and participate in broader conservation efforts in your area.** Understand conservation and adaptation plans of other organizations to see how your efforts contribute to and benefit from other conservation actions in your area.
6. **Prioritize to achieve multiple conservation goals where appropriate.** Sites that meet multiple conservation purposes can help ensure greater permanence and flexibility.
7. **Understand the ownership context of the easement** Current protected areas in government or private ownership can provide the backbone to adapting to climate change. Ensuring connectivity may require cooperative land management with private landowners.
8. **Encourage participation in conservation planning for a changing climate.** Let people know what is likely to happen with climate change in simple tangible language and explain how to help the landscapes we love respond to climate change.
9. **Promote hope in changing times.** Land conservation is one of the most important and cost effective ways to help the lands and resources we love adapt to changes in climate.

RESOURCES

Global Climate Change Impacts In The United States, 2009. U.S. Global Change Research Program, Washington, D.C. <http://www.globalchange.gov/>

Biodiversity Janetos, A., et al. 2008, *The Effects of Climate Change on Agriculture, Land Resources, Water Resources, and Biodiversity in the United States*. Washington, D.C.: U.S. Climate Change Science Program and Subcommittee on Global Change Research. 151-181.

Season's End: Global Warming's Threat to Hunting and Fishing. 2008. Wildlife Management Institute. Bipartisan Policy Center. Washington, D.C. <http://www.seasonsend.org/>

Climate Change Adaptation Across the Landscape, Theoharides, K., G. Barnhart and P. Glick. 2009, Washington, D.C.: The Association of Fish and Wildlife Agencies, Defenders of Wildlife, the Nature Conservancy, and National Wildlife Federation.

Stormy Seas: Land Trusts navigate the uncertainties surrounding climate change, Gentry, B. 2009 Saving Land Vol 28 No 2. <http://www.landtrustalliance.org/>

Climate Change: Land Trusts Take Action, Conner, I. 2008, Saving Land Vol 27 No 2. . <http://www.landtrustalliance.org/>

Conservation Defense Clearinghouse at <http://clearinghouse.lta.org> and **The Learning Center** at <http://learningcenter.lta.org>. are digital libraries from the Alliance to assist attorneys and conservation practitioners with publications, sample documents and other material.

DISCLAIMER

These pointers are provided with the understanding that the Land Trust Alliance is not engaged in rendering legal or other professional counsel. If legal advice or other expert assistance is required, the services of competent professionals should be sought. These pointers were prepared by the Stanford Conservation Climate Change Drafting Committee and the Land Trust Alliance.



Practical Pointers Series

DRAFTING CONSERVATION EASEMENTS TO ADAPT TO CLIMATE CHANGE

Flexible conservation easement drafting means that your land trust anticipates likely areas of change and drafts to address them. For climate change in particular, some areas to draft for flexibility that you might consider are species type and distribution, proximity to water, soil types, contaminants, current and future probable climate temperatures, human population, land uses, management and education possibilities. Most of the following drafting points are equally applicable to conservation easements generally as well as those designed to adapt to climate change. For examples of climate change clauses, see the companion to this Practical Pointer: “Climate Change and Conservation Easement Clause Examples” <http://learningcenter.lta.org>.

1. **Identify the conservation values** that warrant protection, recognizing that some may change over time with climate pressures. Determine what it will take to conserve those values over time. **Be clear about the purposes of the easement** and directly link easement restrictions to the easement purposes and to protection of the conservation values.
2. **Have comprehensive and detailed, project-specific background information.** Especially if a restriction or a reserved right is unusual, include recitals or background information to support and explain it. Ensure that the reader (perhaps the judge in an enforcement action) understands the details and what makes them important.
3. **An easement must be flexible enough to respond to change**, such as species composition and uncertainty of the effects of change, while still protecting the identified conservation values. An easement reflects a partnership between landowner and land trust to preserve conservation values forever, so **discuss the need for flexibility with the easement grantor**; negotiate and draft for holder flexibility to adapt the conservation easement to changing conditions over time, while continuing to protect the land’s conservation values in perpetuity. Consider what flexibility successor landowners will need to respond to climate change especially for working land. Distinguish restrictions that will be strictly applied from those that have flexibility in interpretation.
4. **Predict and address possible points of friction** when possible to avoid challenges from future owners that the easement is too restrictive or out-of-date with changed circumstances. Do not assume that environmental and social conditions and resource needs that exist at the time the conservation easement is negotiated and executed will exist in the future.
5. **Strive for clarity** in what an easement prohibits and what it permits, what approvals an owner must seek before undertaking certain activities and what notice the owner must provide to the holder under certain situations. Clarity and lack of ambiguity make it easier for a landowner to understand and accept easement terms and for a land trust to monitor and enforce them.
6. **Define specific terms.** Review the draft easement for terms that should be defined (in the easement or by reference to a different source); review the document again to locate and correct defined terms that are used inconsistently with their definitions.
7. **Performance standards** may be appropriate in some circumstances and easier to uphold because they offer a flexible goal, rather than a rigid standard. They may also help avoid technical violations that may not actually adversely affect protected conservation values.

8. **Combine prescriptive and performance standards** so that easement goals are more likely to be met during climate change as technology and scientific understanding emerge. Consider if some reserved rights should float based on changing best practices in agriculture, forestry or land management. If so, define criteria in the easement and provide for change over time in conformity with a recognized source of rules (and backup for that source), coupled with land trust approval of a management plan.
9. **Consider including discretionary approval or consent provisions and specify amendment criteria and procedures.** The objective is to prevent easement obsolescence, guide amendment decisions, meet unforeseen circumstances and adapt to changing conservation practices, evolving science and shifting environmental, climate, economic and cultural circumstances while protecting conservation values.
10. **Consider whether easement requirements that look to law should be fixed to current law.** If so, attach a copy of the law as an exhibit because it may be very hard to prove in 50 years what a particular local jurisdiction's zoning law was, for example, was in 2009.
11. **Don't restrict unnecessarily**, especially as to inconsequential details, and keep in mind the fundamental purposes of the easement in drafting the restrictions. Remember that conservation easements are limited interests in land that work best to prevent activities harmful to conservation values rather than to prescribe affirmative land management activities. If rigorous restrictions strip substantially all economic value from the land, include strong explanatory recitals so that all the parties understand the rationale for the restriction.
12. **Recognize that land may change.** Landscape features, such as shorelines and river channels, as well as ecological conditions, may change over time with temperature, water and other influences. Flexible management plans and zone boundaries may help.
13. **Provide for easement termination or modification** contrary to its stated purposes only in accordance with all state and federal laws, court approval and **full proportional compensation of the easement holder**, to be used for similar conservation purposes.

RESOURCES

The Science of Climate Change and Conservation Easements, 2009, Stanford Conservation Climate Change Drafting Committee, available at The Learning Center <http://learningcenter.lta.org>.

Conservation Easement Drafting and Documentation, 2008, by Jane Ellen Hamilton (The Land Trust Alliance) <http://learningcenter.lta.org>.

The Conservation Easement Handbook, 2005, by Elizabeth Byers and Karin Marchetti Ponte (The Trust for Public Land and the Land Trust Alliance).

Internal Revenue Code §170(h) — www.irs.gov/taxpros/index.html

Treasury Regulations §1.170A-14 — www.access.gpo.gov/nara/cfr/waisidx_03/26cfr1v3_03.html

Conservation Defense Clearinghouse at <http://clearinghouse.lta.org> digital library of materials to assist attorneys and conservation practitioners with conservation-related legal issues.

The Learning Center is the Alliance's online searchable library with publications, sample documents and other material. The Learning Center contains a complete guide for implementing *Land Trust Standards and Practices*, including explanations, links and sample documents. <http://learningcenter.lta.org>.

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Climate Change and Conservation Easement Clause Databank

(May 15, 2009, last edited September 3, 2009)

This Databank excerpts conservation easement paragraphs especially relevant to climate change from the CE Databank at <http://www.mhalaw.com/mha/newsroom/cedatabank.htm>. The complete CE Databank is a work in progress assembled by the Stanford Conservation and Climate Change Drafting Committee and a number of conservation easement attorneys and professionals assisting in the work. See Stanford Institute for the Environment at <http://environment.stanford.edu/cgi-bin/index.php>. Additional paragraphs will be added to the CE Databank as they become available, and existing paragraphs will be edited or commentary added when reasons to do so become apparent. Please send suggestions and examples to Ann Taylor Schwing at aschwing@mhalaw.com.

The Databank assumes its users are knowledgeable and thoughtful conservation easement professionals or volunteers. See *Standards and Practices* 9E. It is not a teaching text. Instead, it offers source material and ideas, sometimes inconsistent ideas, that may be appropriate to adapt into particular conservation easements in certain circumstances. The Databank is not legal advice; various paragraphs conflict, and many would be inappropriate to specific circumstances. Paragraphs may or may not be appropriate in a specific State, as there has been no effort to address special state law requirements. Moreover, every easement will require the addition of one or more unique paragraphs and revision of the sample paragraphs set out here to address the characteristics of the specific property and situation.

The Databank has been prepared specifically for donated easements and land trusts. Although some paragraphs may be appropriate in other circumstances, and the Databank may be expanded in the future, the Committee has not included paragraphs specifically intended for mitigation or purchased easements or for government holders.

The Databank uses the terms "Granting Owner" and to "Owner" to distinguish between the original Grantor when only that owner is intended and all Owners when the intent is to encompass both the original grantor and all later owners. Many conservation easements use the term "Grantor" to include subsequent owners. A court might forgive a subsequent owner for not realizing that references to "Grantor" included all subsequent owners as well. Using the term "Owner" whenever the reference is intended to encompass both grantor and subsequent owners reduces the risk of credible testimony by a subsequent owner as to a belief that the provision did not apply to subsequent owners. Having both terms available enables easier distinction when a provision is intended to apply only to the original donor. This terminology does not supplant use of the routine boilerplate provisions defining terms and declaring applicability of the easement to subsequent purchasers of the land. Anyone using the

Databank can freely use “Landowner” as an alternative to “Owner” and can elect not to make the distinction between “Granting Owner” and “Owner.”

The Databank uses the formulation “permission of the Land Trust, as provided herein” instead of referring to “paragraph __.” This formulation is deliberate because edits late in preparation of the document that alter the paragraph numbering are common, and the risk of misnumbering cross-references is high. An erroneous misnumbering can readily result in later disputes as to interpretation. An alternative that also avoids use of specific numbers would be to refer to the paragraph captioned “Discretionary Approval” or “Notice and Approval.”

Linked Alphabetical Index to Climate Change and Conservation Clauses

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<u>Additional Rights</u>	<u>Ecosystem Functions</u>
<u>Alternative Energy/Communications Structures and Improvements</u>	<u>Ecosystem Services Credits</u>
<u>Amendment Provisions</u>	<u>Educational Activities</u>
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<u>Change of Conditions</u>	<u>Natural Acts Beyond Owner’s Control</u>
<u>Climate Change Modification or Relocation of Building Envelope</u>	<u>Natural Resource Benefits</u>
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Addition to Land Trust Rights

Additional Rights—Land Trust shall have the right to exercise such additional rights as may be reasonably necessary to effectuate the purposes of this Easement.

Commentary. This “elastic clause” intended to appear in the paragraph listing the rights of the Land Trust is quite broad and accords the Land Trust significant protection against an unduly restrictive interpretation of other rights paragraphs. Many other types of rights might be included in the rights paragraph if appropriate. If the various examples below that specifically relate to climate change grant rights to the Land Trust, they should be included in the same paragraph or otherwise set out unambiguously.

Sequestration, Greenhouse Gas Mitigation and Similar Paragraphs

Reservation of Forest Carbon Services—Land Trust shall hold, market, and transfer any and all rights related to the Forest Carbon, including but not limited to mitigation credits or offsets, now present or existing in the future, and the right to report such mitigation credits or offsets to any relevant public or private regulatory/oversight body or registry whether pursuant to a voluntary system or created by local, federal, or international law or regulation, which rights arise from or are generated by or from the Property on or after the date of this Easement (collectively, the “**Forest Carbon Services**”). The Forest Carbon Services retained hereunder shall specifically include, but shall not be limited to, the right to hold, reserve, report, market or retire any greenhouse gas mitigation credits or offsets that may be generated upon the Property, and other types of mitigation credits or offsets that arise from the production of Forest Carbon. Land Trust shall have the absolute discretion in determining the purchaser(s) and/or recipient(s) of any Forest Carbon Services and the consideration for such Forest Carbon Services shall inure to the sole benefit of Land Trust.

Commentary. Alternative provisions could retain the rights in the Owner, or split them between the Owner and Land Trust, or retain them in the Granting Owner (and family) but provide for them to belong to the Land Trust when the land is transferred to a new owner or out of the family.

Ecosystem Functions—Granting Owner/Owner may, consistent with the provisions governing use of the land as set forth in this Easement, develop ecosystem functions on the Property including, but not limited to, carbon sinks, stream bank restoration, biodiversity mitigation, carbon sequestration and wetland and stream mitigation (other than creation of wetlands from historically upland property, such as hillsides or sites with no more than one of the following: current or historical evidence of hydric soils, hydrophytic vegetation, or wetland hydrology), provided that such developments are not in conflict or inconsistent with the conservation purpose of or the restrictions set forth in this Easement and that prior written approval for same shall have been obtained from Land Trust. Land Trust is not responsible for monitoring any such activities for compliance with permit(s) therefor, and Land Trust has no obligation to enforce the permits.

Commentary. This and other paragraphs use both Granting Owner/Owner to encourage consideration whether the Granting Owner wishes to reserve these rights personally or wishes them to be available for exercise by future owners. Consider whether to address limitations on surface activities as carbon sequestration could involve piping and wells. Consider whether to limit these activities to a portion of the Property. Also, consider whether to retain the rights in the Land Trust, or split them between Owner and Land Trust, or retain them in the Granting Owner (and family) but provide for them to belong to the Land Trust when the land is transferred to a new owner or out of the family. Each transfer option has risks and potential enforcement problems. The most difficult may be stripping the rights on transfer to a successor owner. If rights remain with the family until transfer to a non-family member, the easement will need to define who is a family member (perhaps by reference to probate and inheritance laws). If the transfer is not automatic, then issues may arise in completing the transfer if the rights have become valuable.

Ecosystem Services Credits – Granting Owner/Owner reserves the right to enter into agreements whereby the Granting Owner/Owner (1) agrees to manage the natural resources associated with the Property in a specific manner consistent with this Easement or (2) permits a third party to manage such natural resources in a specific manner consistent with this Easement. In addition, Granting Owner/Owner reserves the right to sell, trade, or exchange quantifiable ecosystem services credits associated with the Property, provided that any sales, trades, or exchanges shall be exercised in a manner that is consistent with this Easement. All such agreements, and any management of such natural resources in accordance with such agreements, or to accomplish such sales, trades or exchanges, shall be subject to this Easement, and Granting Owner/Owner shall at all times remain responsible for compliance with this Easement. Granting Owner/Owner and Land Trust acknowledge that, because the conservation interests protected by this Easement shall not be adversely affected by any subsequent agreements, exchanges or trades, and the only interest affected shall be Granting Owner/Owner’s interest, any compensation received by Granting Owner/Owner for such agreements, exchanges or trades shall be payable in its entirety to Granting Owner/Owner. Granting Owner/Owner and Land Trust acknowledge and agree that this reserved right does not include the right to exchange, trade, extract, license, lease, transfer, or sell topsoil, minerals, or water located on the Property.

Commentary. One example of such an agreement, sale, trade, or exchange is one under which Granting Owner/Owner receives compensation, including transferable credits, for participating in a greenhouse gas emissions offset program. Another example would be agreeing to restore, enhance or manage a wetland as part of a wetland banking or credit program, provided that such activities do not reduce existing areas of productive timberlands/agricultural lands/open space on the Property and further provided that Granting Owner/Owner may not benefit from any compensation or credits available through such programs or agreements if the restoration is required as a result of Granting Owner/Owner’s violation of this Easement. These and other examples could be set out in the foregoing paragraph or the paragraph could be revised to limit the agreement to one of these or to another example. Consider whether to limit these activities to a portion of the Property.

Natural Resource Benefits—Granting Owner/Owner reserves the right to sell, trade, or exchange quantifiable natural resource benefits associated with the Property, provided that such sales, trades, or exchanges are exercised in a manner that is consistent with this Easement. Such agreements, and any management of such natural resources in accordance with such agreements, or to accomplish such sales, trades or exchanges, shall be subject to this Easement, and Granting Owner/Owner shall at all times remain responsible for compliance with this Easement. Granting Owner/Owner may not benefit from any compensation or credits available through such programs or agreements if restoration is required as a result of Granting Owner/Owner’s violation of this Easement. The Parties acknowledge that, because the conservation interests protected by this Easement shall not be adversely affected by such agreements, exchanges or trades, and the only interest affected shall be Granting Owner/Owner’s interest, any compensation for such agreements, exchanges or trades shall be payable in its entirety to Granting Owner/Owner.

Commentary. Some examples of such an agreement, sale, trade or exchange are set out above. Another example would be agreeing to restore, enhance or manage endangered species habitat as part of a conservation banking or credit program. These and other examples could be set out in the foregoing paragraph or the paragraph could be revised to limit the agreement to one of these or to another example. Consider whether to limit these activities to a portion of the Property.

Property Resources Values—“Property Resources Values” shall mean value obtained through enhancement of the ecosystems or environments on the Property and/or value obtained through Granting Owner/Owner’s refraining from exercising, in whole or in part, any Reserved Right. Property Resources Values include, but are not limited to mitigation or restoration credits for wetlands, forests, prairies, habitats, streams, cultural significance, energy, emissions, carbon sequestration, aquifer recharge, water quality, nutrients, and endangered species habitat or any other similar currency or credit asset for which a market may now or later come to exist. Owner reserves the right to manage or enhance the Conservation Values and/or to refrain, in whole or in part, from exercising Reserved Rights [(including rights to conduct Forest Management Activities)], and to sell any Property Resources Values based upon and associated therewith, provided any such sale shall not physically harm the Property’s Conservation Values and shall not be inconsistent with the Purpose of this Easement. For example, Granting Owner/Owner may create a mitigation bank or participate with other Parties or persons to create a mitigation bank based upon the Reserved Rights in a portion of the Property’s carbon sequestration value or watershed value and receive compensation for the sale of credits from such bank.

Commentary. If included, “Forest Management Activities” must be defined in another paragraph. Consider who should receive the compensation and revise as appropriate and/or move to the section on land trust rights paragraph. Consider whether to limit to a particular portion of the Property.

Mitigation Programs—Subject to Land Trust’s prior written consent, not to be unreasonably withheld, conditioned or delayed, Granting Owner/Owner may exercise

the right to participate in, and retain any income received therefrom, any current or future programs with state or federal agencies or private entities intended to provide incentive or compensation for the restoration or relocation of rare, imperiled, threatened, or endangered species or communities on the Property in a manner designed to restore historic natural systems, or for other environmental preservation or enhancement efforts (including, for example, wetland mitigation, carbon credit, and similar programs), provided such program is consistent with the Purpose of this Easement and enhances the Conservation Values.

Commentary. Consider who should receive the compensation and revise as appropriate and/or move to the Land Trust rights paragraph. Consider whether to state specific factors to be considered in granting or denying consent and/or to grant Land Trust more discretion.

Alternative Energy Possible Additions to Permitted Uses

Renewable Energy/Ancillary Improvements—Without permission from the Land Trust, other improvements, including, but not limited to, facilities for the generation and transmission of electrical power, such as windmills and/or [detached] solar arrays may be built exclusively within the Building Envelope. Generation of any electrical power shall be principally for use on the Property. Ancillary improvements constructed within the Building Envelope count toward the impervious surfaces limitation as set forth herein. Construction of telecommunications towers is prohibited. All energy production plans, construction and distribution contracts and other agreements must be made expressly subordinate to this Easement and to the rights of Land Trust in this Easement to protect the Conservation Values in perpetuity.

Commentary. Limit to particular types of improvements if appropriate. Consider whether to identify the location of these improvements even within the Building Envelope, if large or visible to the public or likely to impact wildlife to minimize impact on conservation values. Depending on the circumstances, specify height, footprint and other limitations on the improvements and consider including a Land Trust approval requirement or a pre-construction notice requirement. Consider whether to permit telecommunications towers that are built as part of the other structures.

Ancillary Improvements—Other improvements, including, but not limited to, facilities for the generation and transmission of electrical power, such as a windmill and/or methane digesters may be built on the Property only for the use on the Property and only with the approval of the Land Trust, as provided herein.

Commentary. Identify the location of these improvements if possible to minimize impact on conservation values. Depending on the circumstances, specify height, footprint and other limitations. Consider whether the limit to use strictly on the Property is appropriate or should be extended to adjacent properties under common ownership or another extension.

Alternative Energy/Communications Structures and Improvements—Structures and improvements necessary to undertake alternative energy activities such as wind, solar, methane and other similar energy generation activities as well as communications

facilities such as cell towers or 911 communications towers are permitted as further described below, so long as they are compatible with the Purposes of this Easement, subordinate to the _____[conservation]_____ use of the Property and located in a manner that minimizes the impact to _____[primary conservation attributes, prime or statewide important soils, scenic, riparian, habitat, etc.]_____.

(a) Building Envelope: Within the Building Envelope, Owner may construct structures and improvements limited to flat rooftop panels [and _____] without permission of Land Trust. Other structures and improvements require prior Land Trust approval as set out herein.

Commentary. Structures that can be concealed inside on immediately adjacent to existing structures, such as a communications tower that can be inside a silo, may also be permitted without Land Trust approval.

(b) _____ Area: Subject to the impervious surface coverage limitations set forth herein and the requirement that they affect no more than __ percent of the _____ Area, such structures and improvements may be built in the _____ Area with the prior approval of Land Trust as set out herein. Land Trust may condition approval upon the posting of a bond providing _____.

Commentary. The size, nature and duration of the bond would depend on the structure. A bond may be appropriate for the construction period but less necessary thereafter. Consider also the need for any ongoing insurance obligation for Owner, for example, to address land restoration after a devastating storm. The size and character of the structure dictate the importance of a bond or ongoing insurance obligation.

(c) Location: Before selecting the location of any site for these structures and improvements, Owner shall give Land Trust an opportunity to participate in an onsite meeting to review proposed locations and any required roads by giving notice as provided herein. Owner shall comply with the _____ State Department of _____[Agriculture and Markets or Environment as appropriate]_____ guidelines for mitigation for impacts causes by construction and operation of such structures.

Commentary. This subparagraph is usually fine if the structure and road are confined to the Building Envelope. If not, or if the envelope is large, then selection of the location should be subject to Land Trust approval. If the Granting Owner has plans to build in the immediate future, then the plans should be defined more specifically in the Easement.

(d) Easement Governs: All plans, construction and distribution contracts and other agreements shall be made expressly subordinate to this Easement and to the rights of Land Trust to protect the Conservation Values in perpetuity.

Renewable Energy Generation—Construction, use, maintenance, repair and replacement of one turbine for the generation of wind energy may be permitted upon receipt of Land Trust’s prior written approval (which may be granted or conditioned or withheld in its sole discretion). When considering whether to issue such approval, Land

Trust shall weigh and evaluate, among other relevant factors, the overall aesthetic impacts of the proposed turbine in the context of the surrounding landscape, the environmental impacts, and the scope of its anticipated energy benefits, and, upon Land Trust’s request, Owner shall be required to provide Land Trust with written documentation addressing these and other matters deemed relevant by Land Trust.

Commentary. Depending on the circumstances, include height, footprint and other limitations and consider whether to limit the location to a portion of the Property.

Wind, Solar and Hydropower Energy—To the extent permitted by, and in accordance with, all then-applicable federal, state, and local laws, regulations, and requirements, Owner may place or construct facilities for development and utilization of wind, solar, and hydropower energy resources for [residential agricultural/] use principally on the Property; provided, however, that there shall be no more than structures

Commentary. The opening clause is often used but is essentially redundant as the Owner must comply with law in any event.

- that may be located within the “Energy Zone” depicted on Exhibit
- that may be located anywhere on the Property except in the
- that may not be located in any location where visible from Road
- that may be no more than feet in height.

Installation of wind, hydropower, and solar energy structures shall be with prior Land Trust permission as provided herein, and Land Trust shall take into consideration the impact on scenic and ecological Conservation Values. All plans, construction and distribution contracts and other agreements shall be made expressly subordinate to this Easement and to the rights of Land Trust to protect the Conservation Values in perpetuity. Owner and the Land Trust hereby agree this paragraph is a reasonable restriction under [applicable law].

Commentary. Omit one or more of wind, solar, and hydropower as appropriate. Consider the risks and benefits of relying in part on “then applicable” laws when their content is unknown when drafting the Easement. Impose any necessary restrictions or limitations in the Easement without assuming laws in the future will do so. The reference to use “principally on the Property” arises from the fact that connection to the electric grid means that excess electricity at any point will flow off the Property while insufficient electricity will be drawn from the grid. The requirement that the facilities be designed to produce electricity for use principally on the Property imposes a limit on size and scope of the facilities.

Community Commercial Wind Generation—The [insert general location, e.g., “ridge line at the northeast corner” or more specific designation, identify on map exhibit] on the Property may have a sufficient wind resource to be suitable for the generation of electric power. Owner and Land Trust may elect to explore wind energy production collaboratively employing [one/ up to /no more than] wind turbines in partnership with community with the

objective of providing energy to that community and not principally for economic gain. Any such wind energy project, including the scale, location and all other conditions, shall require the prior written approval of both Owner and Land Trust, and either party may in its sole discretion withhold or condition said approval.

Commentary. Provide for allocation of any economic benefit. Consider any limits on the size or footprint of the turbines.

Possible Future Commercial Energy Production—As of the date of this Easement, Granting Owner and Land Trust mutually agree that current technology for commercial wind and solar energy generation, using tall and visually intrusive wind turbines and large arrays of solar panels, is incompatible with protection of the Conservation Values, and, therefore, commercial alternative energy production using such technology is prohibited. If alternative energy production technology changes in the future so that alternative energy production on a commercial scale is compatible with protection of the Conservation Values, Owner may seek Land Trust’s approval of an alternative energy production plan in accordance with _____ and taking into consideration the impact on scenic and ecological Conservation Values. All plans, construction and distribution contracts and other agreements shall be made expressly subordinate to this Easement and to the rights of Land Trust to protect the Conservation Values in perpetuity.

Commentary. Set out the limitations and conditions suit the land and circumstances.

Climate Change Modification or Relocation of Building Envelope

Modification or Relocation of Building Envelope—Owner and Land Trust acknowledge that the boundaries of the Building Envelope may have to be adjusted from the configuration shown on the Map to moderate the effect of changing ocean levels [changes in river/creek location over time] and/or erosion of the Property [, as well as other climate change effects]. Owner and Land Trust agree to cooperate in making boundary adjustments, provided that any adjustments shall not result in an increase or (without Owner’s approval) in a decrease in the number of structures or lots permitted hereunder or alter other rights or obligations otherwise recognized or imposed under this Easement. [If the boundaries of the Building Envelope are relocated pursuant to this paragraph, construction of any replacement residence may occur anywhere within such revised area, without regard to limitation to construction substantially within the existing footprint.]

Commentary. Consider a paragraph such as this whenever an Easement grants rights anywhere near an ocean, river, creek or in a location where erosion may occur such as along a bluff as changes over time may affect the exercise of the rights. Use the bracketed “as well as” clause carefully or edit it to be more narrow to fit the circumstances. Edit the second bracketed material as needed for the topography and circumstances.

Other Permissions Paragraphs and Catchall

Ecological/Scientific Research—Owner may engage in and permit others to engage in ecological research on the Property that is consistent with the intent of this Easement, provided that Land Trust approval is obtained as provided herein if the research is more than merely observational.

Educational Activities—Owner may carry out educational activities related to the agricultural use of the Property, including but not limited to educational activities addressing the subjects of sustainable agriculture, food production and nutrition, environmental conservation, and ecology.

Commentary. Consider whether to make it clearer that this permission is limited to Owner or extends to others. If the latter, consider whether Land Trust may need oversight options through prior notice, approval, contract review or other means.

Optional Management Plans—In addition to any management plans required by this Easement for the exercise of specifically reserved rights, Owner and Land Trust may mutually agree on a management plan for the Property intended to implement the provisions of this Easement, including but not limited to the initiation or continuation of activities requiring Land Trust’s prior approval, for a specified period not to exceed _____ years. Neither this provision nor any management plan shall be construed to modify this Easement.

Other Activities— _____

Commentary. Think about all the possibilities and try to address any that are plausible or possible. Some examples would be the following. Consider whether monitoring difficulty outweighs the benefit of these provisions.

Boilerplate Paragraphs

Natural Acts Beyond Owner’s Control—Nothing contained in this Easement shall be construed to entitle Land Trust to bring any action against Owner for any injury to or change in the Property resulting from natural causes beyond Owner’s control, including fire, flood, storm, and natural earth movement, or other natural events, or from any prudent action taken by Owner in an emergency to prevent, abate, or mitigate significant injury to the Property resulting from such natural causes.

Commentary. Consider whether to omit unless the donor asks for this provision. Act of God and emergency would be defenses to a claimed violation in many or all States, but there are likely variations in the scope and nature of the defenses.

Acts of God—Owner may undertake the [clearing and] restoration of land, watercourses, roads, and other structures that have been damaged by fire, flood, earthquake, wind or other natural or human-induced forces. Where possible, forest, shrub, and herbaceous cover damaged by such forces shall be restored with native species appropriate to the site. Under no circumstances shall non-native plants be intentionally introduced outside of the Building Envelope. [Unless otherwise specified, nothing in this Easement shall require Owner to take any action to restore the condition of

the Property after any act of God[or other [unforeseeable] event over which Owner had no control].]

Commentary. An owner needs to be able to act following a natural disaster, but some owners may use the disaster as an excuse to engage in activities prohibited by the Easement and harmful to Conservation Values.

Economic Hardship—In making this grant and in accepting ownership, Granting Owner and Owner have considered the possibility that uses prohibited by this Easement may become more economically valuable than permitted uses and that neighboring properties may in the future be put entirely to such prohibited uses. Both Owner and Land Trust intend that any such changes shall not be deemed to be circumstances justifying the termination or extinguishment of this Easement. In addition, the inability of any Owner to conduct or implement any or all of the uses permitted under this Conservation Easement, or the unprofitability of doing so, shall not impair the validity of this Easement or be considered grounds for its termination or extinguishment. Owner and Land Trust agree that global warming and climate change-caused effects shall not be a basis for termination of this Easement.

Commentary. This provision could be included in the recitals.

Change of Conditions—The fact that any use of the Property that is expressly prohibited by this Easement, or any other use as determined to be inconsistent with the purpose of this Easement, may become greatly more economically valuable than permitted uses, or that neighboring properties may in the future be put entirely to uses that are not permitted thereunder, has been considered by Granting Owner in granting this Easement and by Owners in acquiring this Property. It is their belief that any such changes will increase the benefit to the public of the continuation of this Easement, and it is the intent of Granting Owner, subsequent Owners and Land Trust that any changes should not be assumed to be circumstances justifying the termination or extinguishment of this Easement pursuant to this paragraph. In addition, the inability to carry on any or all of the permitted uses, or the unprofitability of doing so, shall not impair the validity of this Easement or be considered grounds for its termination or extinguishment pursuant to this paragraph.

Commentary. This provision or the much simpler one that follows can be tailored to the special situation of a particular easement when particular changes are foreseeable.

Change of Conditions—If one or more of the purposes of this Easement may no longer be accomplished, that failure of purpose shall not be deemed sufficient cause to terminate the entire Easement as long as any other purpose of the Easement may be accomplished.

Conflict in Conservation Values—If a conflict arises between protection of one or more of the identified Conservation Values that may have an actual impact, or may have a potential impact, on one or more of the other identified Conservation Values, Land Trust intends to enforce this Easement, in its sole discretion, by giving the greatest level of protection to the Conservation Values in the hierarchy and order as listed in the

Recitals, Paragraph __. Land Trust reserves the right to review this hierarchy of Conservation Values from time to time as the public benefits that are provided by this Easement may change over time. Owner acknowledges that Land Trust has the right in its discretion and after consultation with Owner [and Granting Owner if alive and no longer owner of the Property], to modify and to revise this hierarchy by filing a Notice in the public records of _____ County, __[State]__. [Land Trust and Owner may mutually agree to modify and to revise this hierarchy by filing a Notice in the public records of _____ County, __[State]__.] The hierarchy set forth in Paragraph __ is intended to apply only to resolve actual or potential conflicts between protected Conservation Values, and therefore, this Paragraph may not be interpreted or construed by Owner, Land Trust, or any other person to justify a disregard of, or to discount, Land Trust's and Owner's obligations hereunder to protect and preserve all Conservation Values if such actual or potential conflict between protected Conservation Values does not exist.

Commentary. One option is offered if Land Trust has the unilateral right to revise hierarchy of Conservation Values. An alternative in brackets is offered if Land Trust and Owner must mutually approve of revision of hierarchy of conservation values. A Granting Owner may want to retain the right to participate in the consultation or decision, so that option is also available. This provision requires a detailed recital that precisely identifies the "Conservation Values" and the initial hierarchy.

Future Technology – No use shall be made of the Property, and no activity thereon shall be permitted that is or is likely to become inconsistent with the Purposes of this Easement. Owner and Land Trust acknowledge that, in view of the perpetual nature of this Easement, they are unable to foresee all potential future land uses, future technologies, and future evolution of the land and other natural resources, and other future occurrences affecting the Purposes of this Easement. Land Trust therefore, in its sole discretion, may determine whether (a) proposed uses or proposed improvements not contemplated by or addressed in this Easement or (b) alterations in existing uses or structures, are consistent with the Purposes of this Easement.

Commentary. If you are unable to negotiate the sole discretion standard, then consider a mutual agreement standard. At minimum articulate a review standard that does not bind the Land Trust to be objectively reasonable. Reasonableness is highly circumstantial and subjective. In this instance, Land Trust need the ability to determine what is consistent with the conservation purposes and values without reference to economic or contractual reasonableness.

Permitted Amendment – If circumstances arise under which an amendment to or modification of this Easement would be appropriate, Owner and Land Trust may jointly amend this Easement; provided, however, that (i) no amendment or modification shall be allowed that will adversely affect the qualification of this Easement or the status of Land Trust under any applicable laws, including sections ____ et seq. of __[state law]__ or section 170(h) of the Internal Revenue Code of 1986, as amended, and (ii) any amendment or modification shall not harm Conservation Values, shall be consistent with the purposes of this Easement, and shall not affect its perpetual duration. Any amendment or modification shall be recorded in the Official Records of _____

County, _____. This Easement is not otherwise subject to amendment or modification of any sort. No amendment shall diminish or affect the perpetual duration or the Purpose of this Easement, nor the status or rights of the Land Trust under this Easement.

Commentary. See Land Trust Standards and Practices 11I. Consider adding any specific express provisions, for example, that no amendment “can permit additional residences on the Property beyond the number of residences permitted on the effective date”—if appropriate and important for the Property or Owner. This addition may further achievement of donor intent and reassure a donor troubled by the amendment provision

Amendments—Owner and Land Trust expect that this Easement will not be amended or modified. Upon request by the Owner, Land Trust may in its sole discretion agree to amend or modify this Easement, but in no event shall such amendment be made without compliance with both the Land Trust’s internal procedures and standards for such modification and state and local laws regarding the creation and amendment of conservation easements and in conformity with federal laws (including tax laws) associated with conservation easement creation. No amendment shall be allowed that would adversely affect the qualifications of this Easement as a charitable gift or the status of Land Trust under any applicable laws, including section 170(h) of the Internal Revenue Code or the laws of the State of _____, serve to weaken this Easement’s protection of the Conservation Values or affect its perpetual duration. Any amendment shall be recorded in the official records of the county in which the Property is located.

Permitted Amendment Agreed to by Original Granting Owner Only—If circumstances arise under which an amendment to or modification of this Easement would be appropriate, the original Granting Owner and Land Trust may jointly amend this Easement; provided, however, that (i) no amendment or modification shall be allowed that will adversely affect the qualification of this Easement or the status of Land Trust under any applicable laws, including sections ___ et seq. of ___[state law]___ or section 170(h) of the Internal Revenue Code of 1986, as amended, (ii) any amendment or modification shall not harm Conservation Values, shall be consistent with the purposes of this Easement, and shall not affect its perpetual duration, (iii) the original Granting Owner must consent to the amendment if sought by a subsequent Owner, whether or not that original Granting Owner continues to own the Property, and (iv) no amendment is permitted once the original Granting Owner is deceased. Any amendment or modification shall be recorded in the Official Records of _____ County, _____. This Easement is not otherwise subject to amendment or modification of any sort. No amendment shall diminish or affect the perpetual duration or the Purpose of this Easement, nor the status or rights of the Land Trust under this Easement.

Commentary. See Land Trust Standards and Practices 11I.

No Amendment Permitted—No amendment or modification of this Easement shall be allowed under any circumstance absent order of a court of competent jurisdiction.