

**2011 Watershed Agricultural Council Easement Program Overview**

**January 25, 2012**

## **Introduction**

The Watershed Agricultural Council's (WAC) Conservation Easement Program was initially prescribed in the 1997 New York City Watershed Memorandum of Agreement (MOA) as part of New York City's Land Acquisition Program (LAP). LAP organizations seek to acquire land and conservation easements in the West of Hudson watershed for the purposes of protecting New York City's drinking water supply. The LAP consists of programs managed by the New York City Department of Environmental Protection (DEP) which acquires fee land and conservation easements, and WAC's easement program, which acquires conservation easements (CE) on qualified agricultural properties in the New York City watershed. WAC is a private 501 (C) 3 Not for Profit Organization that is not a signatory to the 1997 New York City Watershed Memorandum of Agreement (MOA), but through its contract with DEP, is obligated to adhere to all requirements related to acquisition of easements outlined in the MOA. Additionally, WAC's Easement Program, through its contract with DEP, is required to adhere to all regulatory requirements prescribed in the December 2010 New York City Water Supply Permit (WSP) issued by New York State Department of Environmental Conservation (DEC) to DEP as well as requirements prescribed by the Filtration Avoidance Determination (FAD) issued through the United States Environmental Protection Agency (EPA) and NYS Department of Health (DoH) to the DEP.

## **Changes to the Easement Program required under 2010 Water Supply Permit and Agreement Among West of Hudson Watershed Stakeholders (Side Agreement)**

While WAC is incorporated as private, 501(c) 3, Not for Profit Organization, regulatory and contractual requirements have significantly shaped both the external environment in which WAC's Easement Program operates as well as the internal organizational structure of the program. In December, 2010, the DEC issued a new WSP to the DEP, while the MOA Signatories amended the certain terms of the 1997 MOA through the Agreement Among West of Hudson Watershed Stakeholders concerning NYC DEP's Continuation of Its Land Acquisition Program dated December 27, 2010 ("Side Agreement"). Both the 2010 WSP and the Side Agreement significantly changed the manner in which WAC's Easement Program conducted business in 2011. WAC became obligated to adhere to certain requirements of both the WSP and the Side Agreement via an amendment to WAC's current contract with DEP which was signed by both parties in December 2011.

## **2010 Water Supply Permit**

Under Section 16 of the WSP, WAC's Easement Program was required to amend six clauses in WAC's model Deed of Conservation Easement (CE). The amendment included changes to language in Section 2S, the definition of a Whole Farm Plan, Section 3, the definition of Use Areas, Section 8, Forest Management, Section 19, Monitoring, Section 20, Binding Dispute Resolution and Section 24, Transfer of Easement. Additionally, WAC was required to offer amendments to all landowners (grantors) with previous versions of WAC CEs allowing them to upgrade to the new CE language required under the WSP by June 24, 2011.

Under Section 10 of the WSP, WAC became excluded from acquiring CEs in designated hamlet areas within the West of Hudson (WoH) Watershed, where municipalities adopted resolutions excluding

acquisition by WAC. Under Section 19 of the WSP , Real Property Tax Law , WAC was temporarily prohibited from entering into Purchase and Sales Contracts with landowners in 2011 for new conservation easements until all WoH municipalities had entered into agreements with New York City to implement amendments to provisions of NYS Real Property Tax Law Article 5, Title 4-A. Under Section 12 of the WSP, an existing agreement that required WAC to provide consultation to municipalities in which a WAC CE was being proposed was memorialized.

### **Side Agreement**

Under the Side Agreement , Section 8 , Transparency , WAC agreed to adopt a Transparency Policy which obligated WAC or any future Grantee to conduct business in an open and transparent manner. The terms of the Transparency Policy are similar to the procedures contained in Public Officer's Law pertaining to the Freedom of Information Law (FOIL) and the Open Meetings Law. Under Section 9 of the Side Agreement, Guidance Documents, WAC agreed to develop certain guidelines defining program Standards and Practices according to a schedule of development. Under Section 9, guideline development must include any interested MOA signatory. In 2011, the Easement Program developed stewardship guidelines according to the 2011 guideline development schedule attached to the Side Agreement for the following Reserved Rights: Rural Enterprises, Future Acceptable Development Areas (FADA) , Storage of Waste and Debris, Stream Work , Wind Turbines , Cell Towers and Other Such Devices and Septic Systems.

Finally, under Section 11 of the Side Agreement, WAC and DEP were required to execute an amendment to WACs contract with DEP by December 2011, which obligated WAC to the requirements in the Side Agreement and WSP.

All the requirements applicable to WAC under both the WSP and Side Agreement were successfully implemented by WAC in 2011.

### **Public Bodies versus Private Organizations**

Under Environmental Conservation Law Article 49 in the State of New York , Conservation Easements may be held by a Public Body or a Not for Profit Organization. Public Bodies, which include Governmental Agencies and Quasi Governmental Agencies are subject to the terms of Public Officers Law , which include but are not limited to, the Freedom of Information Law (FOIL) , Open Meetings Law, Article 78 Proceedings and the State Environmental Quality Review Act (SEQRA). Private, Not for Profit Organizations functioning as Land Trusts in New York are generally not subject to the terms of Public Officers Law. Because of certain requirements of the WSP and the Side Agreement, WAC has voluntarily adopted certain characteristics of a public agency ( Public Meetings and FOIL) , even though WAC still maintains its status as a private organization.

## **Program Funding**

For calendar year 2011, the Easement Program's total budget was \$6,850,236. During Calendar Year 2011, the Easement Program's actual expenditures were \$6,455,986, of which \$ 5,158, 813 was expended on Land Acquisition, while the remaining \$1, 297,173 was expended on acquisition transaction costs, stewardship , Personnel, Other than Personnel Services and Administrative Services . The WAC Easement Program is funded entirely through its contract with DEP. As of December 31, 2011 , there was approximately \$5 million remaining on WAC's contract with DEP which expires September 2012. WAC is currently negotiating a new operating contract with DEP which will make an additional \$29 million available for further acquisition of Agricultural and Forestry Easements over the next 5 years. As of December 31, 2011 , there was approximately \$600,000 in WAC's stewardship endowment fund. WAC is currently negotiating terms for funding an endowment which may be addressed in WAC's next operating contract with DEP. WAC currently does not have sufficient funds in its endowment to generate interest to independently steward all the easements in its portfolio and relies on ongoing operational contracts with the DEP to fund easement program stewardship operations. It is estimated by WAC that an endowment of approximately \$15 million is currently needed to generate sufficient revenue to steward it easements. Public bodies are generally funded through operating budgets from a taxing authority , while private organizations are funded through donations, grants or endowments. While funding of WAC's easement program is a requirement for DEP under both the FAD and the WSP, in the event that program funding is no longer required by a FAD , an endowment fund will allow WAC to continue to operate independent of any regulatory requirements.

## **Easement Program Areas**

The easement program currently consists of two major program areas: acquisition and stewardship. Acquisition staff focuses on acquiring conservation easements on qualified agricultural properties in the NYC Watershed, while Stewardship staff is involved in all aspects of managing conservation easements after they close.

As of Dec 31, 2011 WAC's conservation easement portfolio totaled 22,015 acres (20,972 acres of purchased easements and 1043 acres in donated easements ) across 133 properties and 117 original grantor easements. There were 76 Whole Farm Plans covering the 133 properties .

## **2011 Acquisition**

WAC purchases conservation easements on agricultural properties in the New York City Watershed in support of New York City's Department of Environmental Protection's (DEP) efforts to protect New York City's water resources. The acquisition process encompasses the period between application selection and the real estate closing. The diagram below depicts WAC's acquisition process from application to closing (payment). Acquisition consists of 5 distinct phases: Applicant Selection, Land Planning, Appraisal, Offer period, and the Purchase and Sales Contract period, which includes closing. The Easement Committee functions as the deliberative body governing the easement program and Easement Committee approval (vote) is required at every stage of the acquisition process. The Easement Committee meets monthly to review and vote on conservation easement projects as projects

advance through the acquisition process.



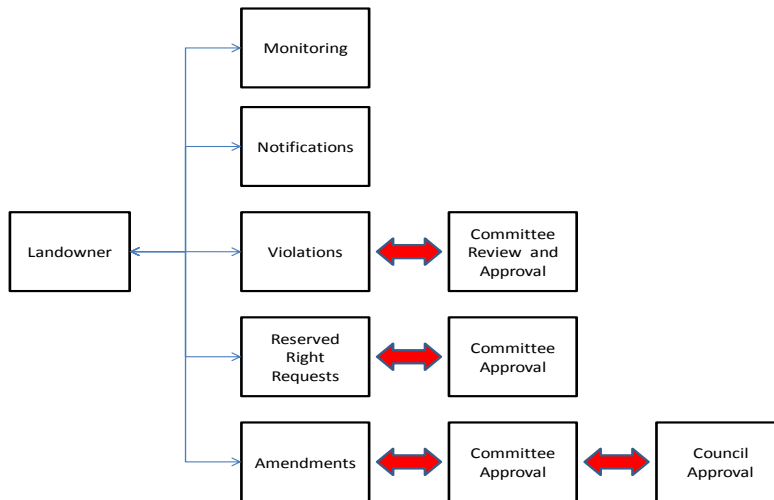
In 2011, WAC Easement Committee approved 9 plans , made 4 Offers , and signed 6 Purchase and Sales Contracts totaling 968 acres and approved closing on 12 properties. WAC staff closed on 13 conservation easements in 2011 totaling 2376 acres.

Acquisition in 2011 was significantly affected by certain terms and conditions of both the December 2010 Water Supply Permit (WSP) and Side Agreement. Under Section 19 of the WSP , Real Property Tax Law , WAC was temporarily prohibited from entering into Purchase and Sales Contracts with landowners in 2011 for new conservation easements until WoH municipalities entered into agreements with New York City to implement amendments to provisions of NYS Real Property Tax Law Article 5, Title 4-A. As such , WAC was unable to enter into contracts with most landowners until June 2011. Additionally, WAC had to halt appraising properties in April 2011 due to funding restrictions that were related to delays in contract negotiations with DEP.

### **2011 Stewardship**

Stewardship involves all aspects of managing a conservation easement in perpetuity after it closes. Upon closing, landowners with conservation easements are assigned to a Stewardship Specialist who serves as their primary contact in matters pertaining to the management of their conservation easement. Stewardship Specialists are responsible for conducting ground and aerial monitoring of all properties in the easement portfolio, as well as processing all related stewardship activities and/or requests that are generally identified through ground monitoring visits and landowner relations .

The general business process for the Stewardship Program Area is represented below. The Stewardship Program area consists of 5 major components : Monitoring , Notifications, Violations, Reserved Rights and Amendments. Red arrows indicate the points in the process at which committee or council approvals are required.



### Monitoring

Each property in the easement portfolio is monitored twice annually (ground and air), which may result in further stewardship activities such as notifications, violations, reserved rights requests or amendments.

Monitoring is managed using a monitoring calendar to schedule property visits by month. A Ground Monitoring Form is used to identify all activities occurring on a conservation easement that may require staff or committee action. This form is used in conjunction with a stewardship database which is used to manage and track all stewardship activities on all properties. Guidelines for Monitoring were approved by the Easement Committee on 6/28/10.

The Stewardship Database allows Stewardship Specialists to quantify and qualify all stewardship activities occurring on all properties, as well as manage the history of a conservation easement on the property.

During 2011, WAC conducted ground and air monitoring on 130 properties (117 original grantor easements) covering approximately 20,972 acres of purchased easements and 1043 acres of donated easements.

### Whole Farm Plan Annual Status Reviews

In addition to monitoring of conservation easements, WAC staff conducts separate monitoring and review of Whole Farm Plans (WFP) on Conservation Easement encumbered properties through Annual

Status Reviews of a property's WFP. Any landowner whose property is encumbered by a WAC conservation easement and engages in commercial agricultural is required to farm in accordance with a current and active Whole Farm Plan approved by WACs Agricultural Program.

There are currently 76 active WFPs covering 117 grantor easements. In 2011, The Easement Program's Agricultural Conservation Planner conducted Annual Status Reviews (ASRs) on 34 WFPs associated with easement properties, while the remaining ASRs were conducted by Agricultural Program staff. 8 WFP revisions were completed for farms with conservation easements, while 8 Supplemental WFPs were developed for easements covered by non easement WFP producer. 18 properties with easements were identified to be in need of an administrative update or revision to their WFPs.

Revisions to Whole Farm plans become necessary when a farmer changes his or her agricultural operations or activities. WAC Easement Program staff will work with the agricultural program staff in 2012 to prioritize WFP revisions on easement properties. Currently, the Agricultural Program only has capacity and funding to complete approximately 15 revisions per year.

### **Notifications**

Landowners are required to notify the Watershed Agricultural Council upon conveyance or lease of an easement encumbered property. Notifications are important because they ensure that WAC can correctly track and identify its interest in a property as well as a landowner's retained rights if a property is conveyed.

As part of the notification process, if a landowner conveys a restricted tax parcel from an encumbered property or subdivides a tax parcel from an encumbered property, they must distribute the retained rights identified in the easement (such as agricultural and recreational structure square footage, new residential structures, subdivisions, and Future Development Areas ) across the divided properties. These rights must be written into the deeds of the conveyed or divided properties and tracked to ensure proper chain of title is established from the original grantor conservation easement.

WAC staff has developed an Allocation Tracking Form for each property which is reviewed with each landowner during annual ground monitoring visits to ensure that WAC and the respective landowner are in agreement about remaining retained rights. There are currently no Notification Guidelines in place. Guidelines are planned for development in 2013.

During 2011, WAC staff processed 8 notifications.

### **Violations, Enforcement and Legal Defense**

The Deed of Conservation Easement represents a legally binding contract between a landowner (grantor) and a Land Trust (grantee). In signing the contract, both parties agree to follow the terms and conditions of the contract. In the event a breach of the contract is identified, the process for resolving a violation is outlined in the Section 21 of the Easement "Enforcement". There are currently no guidelines for violations in place. Development for Violation Guidelines is planned for 2013.

During 2010, WAC staff identified and processed 10 violations, ranging in nature from technical violations for failure to notify, to violations related to unauthorized Forest Harvests, Bluestone quarrying and Waste Storage. Most of the violations identified in 2011 were resolved within several weeks.

### **Reserved Rights**

Along with purchasing development rights and uses associated with several other real property interests, WAC acquires rights to condition certain uses or activities that may occur on a property, which are referred to as Reserved Rights. Requests by landowners to exercise a Reserved Right require approval by the WAC Easement Committee, to ensure the proposed activity is consistent with the terms and conditions of their conservation easement. Stewardship Specialists work with landowners to facilitate and develop Reserved Rights requests, which are then presented to the Easement Committee for review and consideration. Below is a comprehensive list of all the Reserved Rights requiring Committee approval found in WACs conservation easement. Certain Reserved Rights have had guidelines approved by the Easement Committee as indicated :

Forest Harvest Plans - **Guidelines completed**

Forest Management Plans - **Guidelines completed**

Stream Work –bank and bed - **Guidelines completed**

Agricultural Structures greater than 5000 sq ft aggregate outside an ADA

Creation of Farm Support Housing in ADA

Rural Enterprise buildings in ADA - **draft Guidelines completed**

Recreational structures outside ADA over 1000 sq ft aggregate

Pesticide and Fertilizer application in an FCEA

Bluestone Mining

Septic System outside ADA (newer version of CE) - **draft Guidelines completed**

Application of domestic septic effluent, or commercial or industrial sewage sludge

Storage of Waste **Guidelines completed**

Wind Turbines, Cell Towers and Commercial Antennae outside ADA **Guidelines completed**

Right of Way (newer version of CE) **Guidelines completed**

Future Acceptable Development Area (FADA) citing - **draft Guidelines completed**

Subdivision -**Guidelines completed**

In 2011, the Easement Committee processed 21 reserved right requests, including requests to site a Future Acceptable Development Areas (FADA), requests to subdivide, requests to conduct Forest Harvests, requests to locate Rural Enterprises, Stream Work requests, Bluestone Quarrying requests, Waste Storage requests and Rights of Way requests. All Reserved Rights requests were approved except a Reserved Right to store agricultural debris outside an Acceptable Development Area (ADA).

### **Amendments**

The conservation easement is a legally binding document that can be amended under certain circumstances according to standards outlined in the Watershed Agricultural Council's Conservation Easement Amendment Policy and Guidelines for Amendments, which were approved by the Easement Committee on 12/04/ 2008. The guidelines contemplate scenarios under which a landowner might pursue an amendment to a conservation easement. In 2011, WAC's Easement Committee reviewed 7 Amendment requests, including a request to allow for commercial gas drilling, a request for commercial camping outside the Acceptable Development Area, three requests to connect septic systems from structures located in unencumbered lands to septic systems located in WAC encumbered properties, a request to fix a surveying error and a request to update to new CE language allowed under the 2010 WSP. Both the surveying error Amendment and the WSP Amendment request were approved, while the others were denied.

Additionally, WAC staff closed on an amendment to relocate an Acceptable Development Area and mailed letters to all landowners in WACs easement portfolio offering them the ability to update to the newest easement language required under the WSP via an amendment.

### **Stewardship Reporting**

A monthly stewardship report has been developed to track all open stewardship projects. A report showing all stewardship projects by category for 2011 is attached to this report.

### **Program Policy and Guidelines Development Under the Side Agreement**

Six guidelines for Reserved Rights ( Wind Turbines, Rural Enterprises, Future Acceptable Development Areas, Stream Work, Septic Systems and Waste Storage) were developed in 2011 to establish stewardship standards and processes as required under the 2010 Side Agreement. Standards for guidelines were developed under a process that emphasized due diligence by including MOA signatories in working groups while requiring final approval of the guidelines in public meetings. Three of the six guidelines were approved by the Easement Committee in 2011. The three guidelines that were not approved will be re-evaluated in 2012.

While guidelines are intended to create equitable standards that may be applied to all grantors (landowners), WAC's conservation easement represents an individual contract between a grantor and the grantee ( the holder of the easement). As such, guideline standards must be developed so they can be applied broadly among all grantors with WAC conservation easements but also in a manner that is consistent with the terms and conditions of individual conservation easements, which serve as the

controlling legal document between the grantor and the grantee. The intent of Section 8 and 9 of the Side Agreement was to ensure accountability in WAC's decision making as it relates to both the development of guidelines and committee decisions pertaining to landowner requests for Reserved Rights.

Under Administrative Law , public agencies that administer Statutory Law and Regulations are required to apply the law equally and fairly to the regulated community. WAC is legally classified as a private , non -profit organization not subject to Public Officers Law and not informed by the requirements Administrative Law. The primary body of law informing legal actions related to WAC's conservation easements is Contract Law, which recognizes the individual contract as the controlling legal document. Nonetheless, development of guidelines ensures that landowners with similar versions of easement language will be treated equally.

### **Conclusion**

WAC's Easement Program was significantly affected by certain requirements of both the December 2010 Water Supply Permit and the Side Agreement as well as by delays in the negotiation of a new contract with DEP. Because of requirements in the WSP and the Side Agreement, WAC voluntarily adopted certain characteristics of a public agency , even though WAC still maintains its status as a private organization. While continued development of WAC's stewardship program has resulted greater definition of standards and practices and reification of the 5 major components of the stewardship program area, the associated costs of stewarding to such standards has resulted in discussion by Council on how to fund an endowment for Stewardship.