

Watershed Agricultural Council Conservation Easement Program

Enforcement Guideline



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This guideline defines the process by which enforcement actions shall occur, clarifies the deed requirement of immediate notice to landowners, and specifies the role of the Easement Committee (“EC”) when potential violations of conservation easements (“CEs”) occur and/or when remedial actions are needed. The Easement Committee has the discretion to adapt these procedures to the different circumstances presented by a particular enforcement event.

1. DEED LANGUAGE

Section 22 or 23 of the deed of CE (titled Enforcement in all CE versions) provides a sequence of steps to follow when a violation is discovered:

ENFORCEMENT

“In the event a violation or imminent violation of this Easement occurs, Grantee shall immediately notify the Grantor to request that the activity cease and arrange a site visit to mutually resolve the situation to the satisfaction of both parties.

If the Grantor ceases the activity in violation, but is unwilling or unable to cure any violation within ten (10) calendar days after the Grantee’s initial site visit, Grantee shall send Grantor a written notice of non-compliance, which shall notify Grantor of the violation and the measures reasonably calculated to cure such violation or imminent violation. Grantor shall have twenty (20) calendar days from the date the Grantor receives such notice, or such other period Grantee may deem appropriate, to cure the conditions constituting the violation. In the event the Grantor fails to cure the violation within the aforementioned twenty (20) calendar days or period designated by Grantee, Grantee shall seek to enforce such other legal and/or equitable remedies as Grantee deems necessary to ensure compliance with the terms and purposes of this Easement.

In the event that the Grantor refuses to cease such activity or agree to a site visit, or when Grantee determines that a violation or imminent violation could substantially impair the purposes of this Easement, or that an imminent or immediate threat to the City’s drinking water supply exists, Grantee may seek an injunction to stop it, temporarily or permanently. If a court with jurisdiction determines that a violation may exist or has occurred, the court may also issue an order requiring the Grantor to restore the Property to its condition prior to the violation.

In any case where a court finds that a violation has occurred, the Grantor shall

reimburse the Grantee for all its expenses incurred in stopping and correcting the violation, including but not limited to reasonable attorney's fees. The failure of the Grantee to discover a violation or to take immediate legal action shall not bar it from doing so at a later time."

2. IDENTIFYING AND RESPONDING TO SUSPECTED VIOLATIONS

A. Discovery, Documentation, Request for Cessation and Response to an Uncooperative Landowner.

CE violations may be discovered during routine Annual Monitoring Visits ("AMV"), Annual Status Reviews ("ASR"), aerial monitoring inspections, or reported by neighbors and/or other third parties such as a partner agency (i.e. DEP, DEC, NRCS, SCWD, CCE, municipality, etc.). WAC shall not divulge the source of a third party report to any other party, including the landowner, unless allowed to do so in writing by the source or by WAC's legal counsel, or required to do so by law or court order.

i Review the Survey prior to the site visit

Staff shall review the survey and any subdivision maps to confirm current ownership and attempt to locate the activity within the appropriate use area on the property.

ii Landowner Interview

The landowner should be interviewed and advised of WAC's preliminary concerns pending a review of the deed and the circumstances. At this initial discovery stage staff should not be determining whether the deed has been violated or not, but should be collecting information on what portion of the easement property has been impacted, determining the impacts, and recording the landowner's explanation of the situation. In the case of an obvious major violation, staff shall advise the landowner of the violation and request cessation.

iii Inspect and Document Suspected Violations

Within seven (7) working days of the discovery of a minor violation, WAC's EP Stewardship Staff shall visit the property to inspect and document the suspected violation. If a major violation is discovered, reported or suspected, the initial inspection will be performed immediately. If for some reason an immediate inspection is not possible, the landowner will be contacted to request cessation of the activity until an inspection can be performed. Photos keyed to a photo point map are taken and, if possible, compared with photos taken before the activity in question occurred. Details of the potential violation are recorded, including: location, dates, times, parties involved (loggers, neighbors, etc.), and scope/scale of activities in question. Damages should be documented in quantitative terms, e.g. number of trees cut down, length and width structure/improvement, etc., and an initial assessment should be compared to the pre-disturbance condition of the property. This can later be referenced to specific sections of the baseline documentation report and/or reports of monitoring visits conducted before the violation occurred.

iv. Request for Cessation

Staff should find out whether the activity is complete or in progress in order to assess the urgency of the matter and the severity of the potential violation. Staff should request cessation as required by the easement deed to allow a review of the activity by staff and the EC. If damaging activity is underway and the landowner is not available or is non-responsive, staff should send a written request for cessation to the owner and provide a copy to an agent or any responsible party on the property during the inspection.

v. Encroachment

If the landowner is unaware of the activity or it appears to be an encroachment, WAC will provide guidance to the landowner on how to address the situation, and offer an immediate site visit to address any activity that is threatening or damaging sensitive resource areas on the property or otherwise violates the CE terms. See Giii below for more guidance on encroachments.

vi. Uncooperative Owner

If the activity is clearly a major violation and the landowner is unwilling to cease the activity, staff must immediately notify the EC and seek a legal determination on whether to pursue an injunction to stop the activity. If the landowner refuses to allow Stewardship Staff to enter the property to conduct the inspection, the Easement Program Director shall contact the landowner to seek their cooperation and, if not received, immediately consult with WAC legal counsel and the EC to determine whether seeking an injunction as allowed by the CE deed is appropriate, and what next steps can be taken to address the potential violation. Where a grantor prohibits access by staff and prior to obtaining access by other means, an effort should be made to inspect from the road frontage or by air and document the activity. See H below for more guidance on uncooperative owners.

B. Confirm Violation and Determine Severity

Within 5 business days after the inspection of the suspected violation, Stewardship Staff shall review the information gathered during the inspection against the terms of the CE and other stewardship resources. At this point, staff confirms the violation, determines severity (Technical, Minor, or Major violation as defined herein) and recommends corrective actions necessary.

a. Technical violation: A violation of the terms of the CE that has a de minimus impact on the conservation purposes or the resources protected by the CE and requires no urgent action. Technical violations can often be resolved by explaining the terms of the CE to the landowner both verbally and via written correspondence. Technical violations will be handled directly by Staff and reported at the next EC meeting.

b. Minor violation: A violation that involves some damage to the conservation purposes or the resources protected by the CE. Minor violations may require some small degree of repair or restoration in order to restore compliance with the terms of the CE. Minor violations will be handled directly by Staff and reported at the next EC Meeting. In some cases, such as where the landowner is hostile or unresponsive, the minor violation should be reported to Terra Firma consistent with the requirements of their coverage.

c. Major violation: Any action that causes permanent or substantial damage to the

conservation purposes or the resources protected by the easement or directly impacts water quality. Major violations will likely require restoration and/or remediation work to restore the site to a condition similar to that before the violation occurred. All correspondence with the landowner relating to major violations or potential major violations shall be sent by certified mail, return receipt requested. Discovery of a potential major violation must be reported immediately to Terra Firma consistent with the requirements of their program. Examples of major violations include but are not limited to the construction of a building or improvement such as a residence or rural enterprise parking lot located outside of the ADA when the deed limits that improvement to the ADA; the observed or reported failure of a septic system; and stream work done without prior approval.

ii If a violation also conflicts with applicable ordinances, laws, regulations or permits, Staff will inform the EC and recommend whether or not the appropriate agency should be notified of the activity and its impact on any regulated resource area, consistent with the CE deed section on Other Laws and Regulations in Effect.

C. Notice to DEP

If there is an imminent or immediate threat to the City's drinking water supply or if the violation may be due to gross or willful negligence, DEP should be immediately notified of the situation.

- i. Depending on the nature of the violation, DEP may choose to initiate their third party enforcement rights under the deed.
- ii. DEP may, in extreme circumstances, notify the NYS Attorneys General office who also has third party enforcement rights.
- iii. Prior to commencing an enforcement action in a court of competent jurisdiction, the City of New York or the New York State Attorney General must first notify Grantee and Grantor, give Grantee sixty (60) days to take appropriate action, including commencing an enforcement action, and give Grantor sixty (60) days from the receipt of such notice to cure the breach.

D. Notice to Easement Committee

For all violations, a timeline and Staff recommendations shall be reported to the EC via the Violation Summary at the next EC meeting. Major violations or potential major violations shall be presented to EC for formal consideration at the first opportunity with the understanding that the EC may postpone a determination until further information is available.

E. Easement Committee determination

Potential violations may require interpretation of the CE deed language to assess whether a violation exists or not. Potential violations must be reported promptly to the EC for review. When staff determine that a potential violation is either remedied or not a violation, that information shall be brought to the EC for a formal determination that it is consistent with the CE deed terms and any applicable guideline.

F. Landowner Follow-up

i. Stewardship Staff shall document all meetings related to a potential violation within seven (7) working days. As required by the Enforcement Section in the deed, Staff will send a written notice of non-compliance to the landowner if the violation has not been cured by the landowner within 10 days of Grantee's initial site visit. Further correspondence will at a minimum be generated as required by the timelines in the Enforcement Section of the CE deed.

ii. As soon as practicable, following each EC meeting where the matter has been discussed, another letter shall communicate any decisions rendered by the EC, confirm any agreements made with the Grantor about resolving the violation, and conveying any schedules for completion of the necessary work. All notices relating to either major violations or minor violations shall be sent via certified mail or hand delivered.

G. Voluntary Restoration/Compliance

i. If the landowner agrees to restore the property to the satisfaction of WAC, a written plan will be prepared for signature by the landowner and approval by the EC. In situations where remediation is extensive, Stewardship Staff checks in with the Grantor and visits the property as work progresses. The property is inspected by WAC at important milestones and on the date by which restoration work is to be completed. The restoration work is documented with photographs, narrative description, and quantitative measurements (such documentation, as well as all correspondence with the landowner, is stored in WAC's permanent and working files). After the inspection, Stewardship Staff sends the Grantor a follow-up letter (hand delivered and/or certified mail) confirming remediation efforts and status of the violation. The EC is advised of all developments regarding landowner compliance in timely fashion, is provided copies of all correspondence, and makes determinations regarding the status of the violation as appropriate.

ii. Remediation should result in restoration of the property to either its pre-violation condition or something better from a resource protection perspective. WAC must take care to avoid giving the impression that a landowner can "buy his or her way out" of an easement violation. Any alternative other than full restoration must be carefully scrutinized to make sure that it is either better than or equal to the circumstances prior to the violation, and so does not confer impermissible private benefit or private inurement to the Grantor.

iii. When third parties encroach on land under CE and damage the property, WAC will assist the landowner's efforts to stop the violation and remediate any damages caused by third-party actions. The remediation obligation for a third party violation is the same as that for a landowner violation. If the third party is unwilling to cooperate with the Grantor and WAC, WAC may seek a court order compelling either the third-party violator or the Grantor to cease the activity and remediate the damage. The binding legal agreement between the Grantor and WAC obligates the Grantor to protect and defend their property from encroachments that violate the CE deed.

H. Non-compliance

i. If the Grantor refuses to cease the activity in violation or to voluntarily restore the property, the CE Program Director consults with WAC's attorney and EC to discuss the violation and obtain a determination regarding an enforcement strategy. Potential strategies include but are not limited to:

- a. Sending a second certified letter demanding cessation of the violation and the immediate restoration of the affected conservation values;
- b. Asking other agencies with enforcement authority to address the activity;
- c. Initiating litigation with the approval of the WAC Board, to obtain a court order against the Grantor.

ii. Litigation seeking an injunction requires approval from the WAC Board, and should be pursued consistent with the CE deed Enforcement section where necessary to defend easement interests, stop damage to the easement property, and to obtain full remediation of the property.

I. Public Relations

An enforcement action may lead to inquiries from the media, neighbors, other landowners, government agencies, etc. When enforcing a CE violation, certainly if legal action is involved, WAC shall designate a spokesperson for the organization and adhere to the following guidelines in managing public relations. Unless otherwise delegated, WAC's designees are reserved to the Executive Director, and Easement Program Director.

i. WAC does not seek publicity in the event of a violation. WAC may choose, however, to respond to inquiries, correct misstatements of facts reported in the media, and clarify its role and responsibilities as the CE Grantee. Such duties and all communications shall be reserved through WAC's Easement Program Director.

ii. In discussing the violation publicly, WAC shall not attribute motive or intention to the violator. Public statements will instead focus on the fact that the CE was violated and it is WAC's obligation to see that the violation is remedied and the original conservation values restored to the greatest extent possible.

iii. WAC respects the Grantor's privacy, regardless of whether or not the violation resulted from a mistake or misunderstanding. Again, the focus is on the need to remedy the violation, not on the Grantor.

iv. When pursuing legal action, WAC should consult with its attorney as to what information may be released before making any public statements about the violation and/or enforcement actions. WAC shall not divulge the source of a third party report to any other party, including the landowner, unless allowed to do so by the source or by WAC's legal counsel or required to do so by law or court order.