

# Watershed Agricultural Council Conservation Easement Program

## Waiver/Amendment Guideline



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Acting in its capacity as a land trust, the Watershed Agricultural Council (WAC) is responsible for enforcing and upholding the integrity of the perpetual conservation easements (CEs) it holds. WAC recognizes that while waivers and amendments to conservation easements are not routine nor considered lightly, they can serve to strengthen an easement or improve its enforceability, so long as the waiver or amendment results in either a beneficial, or net-neutral, impact on the conservation purpose of the CE and is consistent with WAC's mission.

In furtherance of its mission, WAC purchases and enforces CEs that protect the water quality of the New York City watersheds and protect agricultural and forestry lands by limiting the form, location, and density of development and to facilitate stewardship of the Easement Property. Circumstances may arise that warrant an amendment or waiver of certain provisions of existing CEs WAC may seek to waive or amend CE terms to improve the effectiveness of an existing CE, or to augment conservation benefits. The following waiver/amendment guideline is intended to provide guidance on the criteria, conditions and standards for review and approval of amendments or waivers; it is not intended to alter the terms of any CE deed and, should there be any inconsistency between the guideline and a CE deed, the CE deed controls.

### A. Authority

CEs are acquired by WAC under the authority of Article 49, Title 3 of the New York State Environmental Conservation Law (ECL). Conditions for modifying CEs are set forth at Section 49-0307 which provides that CEs may be modified "as provided in the instrument creating the easement."

WAC's Agricultural Conservation Easement template provides in Paragraph 26 "WAIVER OR AMENDMENT" that:

"This Easement may not be materially amended without the written consent of the Grantee, Grantor, and the Attorney General. Any other amendment, modification or waiver will require the written consent of the Grantee and Grantor. Any amendment, modification, or waiver shall be consistent with the purposes of this Easement and shall comply with Section 170(h) of the Internal Revenue Code, or any regulations promulgated in accordance with that section. Any such amendment shall also be consistent with the Environmental Conservation Law or any regulations promulgated pursuant to that law."

WAC's Forest Conservation Easement template provides in Paragraph 19 "WAIVER OR AMENDMENT" that:

"The Conservation Easement may not be materially amended without the written consent of the Grantee, Grantor, and the NYS Attorney General. Any other amendment,

modification or waiver shall require the written consent of the Grantee and Grantor. Any amendment, modification, or waiver shall be consistent with the Conservation Purposes of the Conservation Easement and shall comply with Article 49 of the NYS Environmental Conservation Law or any regulations promulgated thereunder.”

Section 170(h) of the Internal Revenue Code requires that the conservation purpose of a conservation easement be protected in perpetuity, meaning that any amendment or waiver thereto shall not adversely impact the conservation purpose of the conservation easement.

## **B. Fundamental Criteria for Waiver/Amendment Approval.**

The following principles form the core of the waiver/amendment guideline. Each of these principles constitute a pre-condition to every waiver or amendment and any waiver/amendment granted by the Easement Committee shall satisfy all the following:

1. Preserves or enhances the conservation purpose(s) of the CE.
2. Preserves or enhances the public interest of the CE.
3. Is consistent with WAC’s mission.
4. Complies with all applicable local, state and federal laws and regulations.
5. Does not jeopardize WAC’s status as a qualified not-for-profit conservation organization under state or federal law.
6. Is consistent with WAC’s Conflict of Interest Policy.
7. Does not result in private inurement or confer impermissible private benefit.
8. Has a net beneficial or neutral effect on the relevant conservation values protected by the easement.
9. Does not materially amend the CE without the written consent of the Attorney General.

## **C. Review Factors.**

In analyzing the fundamental criteria set forth in Section B above, WAC shall identify, evaluate and document the following factors:

1. Potential impacts to water quality.
2. Potential impacts to agriculture and/or forest lands.
3. Potential impacts to the Conservation Purposes of the CE.
4. Potential impacts to WAC’s stewardship resources.
5. Potential impacts on enforcement of the CE.

## **D. Examples of Potentially Permissible Amendments.**

As explained above, all of the Section B criteria must be met before a waiver/easement can be granted. Following are examples of specific types of amendments that WAC may review and guidance on specific factors that may be of particular significance to certain types of amendments. It is not intended to suggest that the Section B criteria do not apply to these types of amendments.

### **1. Updates to Standard Language and Format**

Standard language and format of a CE may be amended for the following reasons:

- a. to correct grammatical or typographical errors,
- b. to reflect new standard clauses,
- c. to reflect statutory changes,
- d. to reflect policy changes,
- e. to improve enforcement and administration procedures, and/or
- f. to enhance the protection of the conservation values of the protected property.

## **2. Correction of Error**

To correct an error or oversight in an original CE or survey so long as sufficient written or documented information to support such a claim that error occurred in the development of the easement is provided.

## **3. Clarification of an Ambiguity**

To seek clarification of ambiguous language.

## **4. Increase Conservation Benefit**

To add additional land or restrictions to a conservation easement, where adding land or restrictions would increase the conservation benefit of the easement.

## **5. Changes to Reserved Development Rights**

- a) Reserved Development Rights are those permitted uses specifically identified in the CE that are either allowed without prior notice to or approval of Grantee, allowed only with prior written notice, or allowed only with prior notice and written approval.
- b) The addition of new Reserved Development Rights shall be prohibited.
- c) The extinguishment or reduction of Reserved Development Rights shall be authorized to increase conservation benefit.
- d) All other modifications to the terms, permissions or restrictions of Reserved Development Rights, as set forth in the CE, may be considered so long as:
  - a. The modification does not result in a negative impact on conservation purposes of the CE.
  - b. The modification does not result in private benefit for the landowner, including but not limited to increased property value as determined by an appraisal conducted by an independent New York state certified appraiser.
  - c. All costs for such requests, including appraisal fees, shall be paid for by the landowner. WAC will consider sharing or incurring the associated costs if the proposed action has a clear conservation or stewardship benefit. Except for costs, WAC shall not accept payment as consideration for modification or changes to Reserved Development Rights.

## 6. Reconfiguration of Designated Use Areas

To reconfigure Designated Use Areas under the following scenarios:

- a) Modification of boundary lines for the following designated use areas only: Agricultural Conservation Easement Areas (ACEAs), Forestry Conservation Easement Areas (FCEAs), Resource Protection Areas (RPAs), Multiple Use Area (MUA) and the Forest Area (FA).
- b) Relocating an Acceptable Development Area (ADA) or modifying boundary lines for ADAs that do not contain any pre-existing structures, so long as the size of the ADA does not increase or encroach on any RPA.
- c) Modification of boundary lines defining ADAs that contain existing structures so long as the size of the ADA does not increase or encroach on any RPA.
- d) Modification of Future Acceptable Development Areas (FADAs), so long as the size of the FADA does not increase or encroach on any RPA, shall not require a CE amendment. Relocation of the FADA still requires notice and written approval of WAC.
- e) Reconfigurations may be initiated by either WAC or the landowner and require the written consent of both parties.

## 7. Merging Two or More Separate Easements

To merge two or more easements to create a single easement, so long as:

- a. The merger preserves or enhances the conservation purposes of both easements and no impermissible private benefit will be received by the landowner as the result of the merger.
- b. All costs for such mergers, including appraisal fees, shall be paid for by the landowner. WAC will consider sharing or incurring the associated costs if the proposed action has a clear conservation or stewardship benefit. Except for costs, WAC will not accept payment as consideration for mergers.

**E. All decisions to approve waivers or amendments shall be within the sole discretion of WAC. Prior decisions to approve waivers or amendments to the subject CE or any other CE held by WAC shall not serve as binding precedent on any future requests.**

## F. Discretionary Waivers

## What is a Waiver?

1. Waivers allow for an activity that may not comply with the permissions or restrictions of Reserved Development Rights, as set forth in the CE.
2. Waivers do not require an amendment to the CE and cannot be used as a substitute for an amendment.
3. Waivers may be used to resolve a minor or technical violation of the CE. For example, where an ambiguity in the CE may result in a violation, a discretionary waiver may be issued to resolve it.

## Effect of Waiver

4. Waivers are revocable at any time at WAC's sole discretion.
5. Waivers may be renewed at the sole discretion of WAC.
6. Waivers are unique and landowner-specific and do not run with the land.
7. Any active Waivers shall automatically expire upon transfer of title to the property.

## Waiver Approval

8. Waivers must meet the fundamental criteria described in Section B above and the Section C review factors shall be applied to all waivers.
9. Waivers must also meet the following criteria:
  - a. Waivers shall be temporary in nature with a defined term and expiration.
  - b. Waivers shall be considered only for a defined purpose or activity.
  - c. Waivers shall not involve the placement or construction of permanent structures or infrastructure.
  - d. Waivers shall only involve uses or activities that are incidental and subordinate to the primary agricultural/forestry use or natural resource protection use of the property.
  - e. Waivers may require a demonstration by the landowner that the conditions and restrictions of the CE may have caused unnecessary hardship that can be temporarily avoided by the waiver. For the sake of clarity, any demonstrated hardship does not justify a waiver if the criteria in Section B & C are not met.
  - f. Waivers shall be the minimum forbearance deemed necessary and adequate to address

any potential hardship proven by the landowner and at the same time preserve and protect the conservation purpose of the CE.

g. Landowner shall hold WAC harmless and indemnify WAC from any and all claims arising out of the approval of a waiver.

h. WAC may impose additional conditions and restrictions as are directly related and incidental to the proposed waiver.

## **G. Waiver Review Process**

a. Form of Waiver Request; Necessary Submission Materials

2. WAC staff shall prepare a draft recommendation report on waiver requests based on consistency with these guidelines;

3. Staff recommendation report, including a draft waiver decisional document and resolution, shall be provided to legal counsel for completeness and consistency with these guidelines;

4. A copy of the material provided to legal counsel shall be forwarded at the same time to DEP.

5. A complete final written recommendation shall be provided to the EC for its consideration and determination.

6. Waiver recommendations presented to the EC shall include the following;

a) A written Waiver request from the landowner

b) Staff memo detailing the waiver request (relevant CE clauses, legal counsel findings, waiver term, motion, justification for approval/denial under this Guideline, etc.).

c) Relevant mapping to visually display waiver proposal

d) Proposed EC resolution including the activity-specific waiver document

7. The EC shall review waiver recommendation at regularly scheduled EC meetings. EC determinations on waivers require unanimous vote of the EC and may contain conditions as the EC determines reasonable and appropriate.

8. WAC staff shall inspect activity/property-specific waivers at the beginning and end of the term and as otherwise necessary to determine full compliance with the approved waiver.