

# Working Lands Conservation Easement Guidance Document



A Resource for Information on and Examples of  
Working Lands Conservation Easements  
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**Working Lands Subcommittee  
Working Lands Conservation Easement Guidance  
Document**

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**Working Lands Subcommittee Membership  
NCASWCD Community Conservation Committee**

Working Lands Subcommittee Membership:

Bob Ritchie – Chair, Cabarrus SWCD  
Brian Harwell – Iredell SWCD  
Dave Slater – Polk SWCD  
Bobby Stanley – Columbus SWCD  
Kalen Kingsbury – Piedmont Land Conservancy ([www.piedmontland.org](http://www.piedmontland.org))  
Tandy Jones – Triangle Land Conservancy ([www.tlc-nc.org](http://www.tlc-nc.org))  
Andrew Branan – Farm Transition Network ([www.ncftn.org](http://www.ncftn.org))  
Chester Lowder – Farm Bureau ([www.ncfb.org](http://www.ncfb.org))  
Dewitt Hardee – NC Department of Agriculture Farmland Preservation Trust Fund  
([www.ncadfp.org/FarmlandPreservation](http://www.ncadfp.org/FarmlandPreservation))

Advisors:

Robin Hammond – NC Clean Water Management Trust Fund ([www.cwmtf.net](http://www.cwmtf.net))  
Scott Pohlman – NC Department of Environment and Natural Resources Tax Credit  
Program ([www.onencnaturally.org/pages/ConservationTaxCredit](http://www.onencnaturally.org/pages/ConservationTaxCredit))  
Bob Slocum – NC Forestry Association ([www.ncforestry.org](http://www.ncforestry.org))  
Greg Walker – US Natural Resource Conservation Service ([www.nc.nrcs.usda.gov](http://www.nc.nrcs.usda.gov))  
Bill Yarborough – NC Department of Agriculture ([www.ncagr.gov](http://www.ncagr.gov))

Staff Support:

Lisa Creasman - Conservation Trust for NC ([www.ctnc.org](http://www.ctnc.org))  
Edgar Miller - Conservation Trust for NC ([www.ctnc.org](http://www.ctnc.org))  
Jerry Dorsett - DENR Working Lands Coordinator ([www.onencnaturally.org](http://www.onencnaturally.org))  
Michelle Lovejoy - Division of Soil and Water Conservation ([www.enr.state.nc.us/DSWC](http://www.enr.state.nc.us/DSWC))

Legal review:

William A. Anderson, III  
Kennon, Craver, Belo, Craig & McKee, PLLC  
4011 University Dr., Ste. 300  
Durham, NC 27707  
Tel 919.490.0500 (ext. 246)  
[www.kennoncraver.com](http://www.kennoncraver.com)

## II. BACKGROUND AND INTRODUCTION

North Carolina is one of the top states in the United States in farmland and forest loss. The protection of working farmland and forests is critical to the long term stability and sustainability of the agriculture industry in North Carolina. One of the most effective and fastest growing forms of farmland and forest protection is a working lands conservation easement (WLCE).

A conservation easement, used since the late 1800's, is a legally binding agreement between the owner of the land encumbered by the easement and the holder of the easement that restricts the development and use of the land to achieve certain conservation goals, such as preservation of wildlife habitat, water quality, open space, or working agricultural and forest lands.

Fortunately, North Carolina's 96 Soil and Water Conservation Districts (SWCDs) and the state's 24 local and regional land trusts are able to hold WLCEs, and in many instances already do. SWCDs interest and involvement with WLCEs is based on a number of factors, including:

- established strong working relationship with landowners;
- commitment to permanent conservation of soil and water resources;
- response to increased landowner interest in preserving their farms and forests;
- mitigation of farmland loss in the state; and
- continuance of SWCD of strong landowner working relationships (the most important element to establishing and maintaining a successful working lands conservation easement).

In some regions of the state, landowner interest in WLCE programs is outpacing available resources. SWCDs and local land trusts need to maximize their limited resources through collaboration in order to respond effectively and efficiently to the demand for working lands conservation.

Recognizing this need, the Community Conservation Committee of the North Carolina Association of Soil and Water Conservation Districts adopted a policy to establish a conservation easement workgroup – the Working Lands Subcommittee (WLS) - at the 2008 Annual Meeting.

The WLS and other partners are implementing a project to develop and provide resources and workshops related to WLCEs to SWCDs and land trusts statewide. Funding for project was provided to Conservation Trust for North Carolina (CTNC), one of the project partners, by the Tobacco Trust Fund Commission (TTFC). TTFC was created to assist persons presently or historically engaged in tobacco-related businesses by funding programs that support their needs and a strong agricultural economy (<http://www.tobaccotruffund.org/>).

One of the primary tasks for the WLS has been the development of this document, created to provide guidance on the negotiation and preparation of key portions of WLCE documents. The manual is not intended to be a comprehensive guide to conservation easement transactions, but rather a complement to the many other resources available on conservation easement transactions.

In the manual, Article II addresses key issues in WLCE drafting, and Article III discusses the important aspects of the factual recitals of the WLCE. Beginning with Article IV and continuing through Article VII, the manual provides WLCE sample language. The sample language is denoted in the text by paragraphs that are not indented. Commentary on the language is offset by indented paragraphs headed by the word "COMMENTARY." For convenience of reference in this manual, the

landowner is generally referred to as the “grantor” and the SWCD or land trust easement holder, the “grantee.”

### III. KEY ISSUES

WLCEs present unique challenges, especially resolution of the inherent tension between the grantee's goal of permanently protecting soil and water resources, the landowner's goals of maintaining an economically viable farm/forest and retaining maximum flexibility within the document to respond to unforeseen economic conditions and technology changes in agriculture. A carefully drafted WLCE can be an appropriate and effective tool for conserving the natural resources of the property and meeting the landowner's goals.

Below are some of the key considerations in entering into a WLCE transaction.

*WLCEs Defined.* An easement is a property right granted by the landowner (grantor) to the easement holder (grantee). It is a legally binding agreement requiring that both parties consent to the terms. In a WLCE the grantor grants to the grantee the development rights of the property, but retains the right to use the land for agricultural or forestry purposes subject to certain restrictions. The grantee accepts the obligation to hold the conservation easement and is granted the authority to enforce its terms against the grantor. The transfer of the development rights to a qualified conservation organization or agency are intended to ensure that the property will never be developed beyond the uses allowed in the easement.

The fewest number of parties involved in the WLCE are two: grantor and grantee, although additional parties may be involved. For example, if the grantor donates the development rights of his or her land and intends to apply for the federal charitable tax deduction or North Carolina state tax credit, the transaction must meet the relevant tax law requirements. If the grantor receives money from a funding agency (NC Clean Water Management Trust Fund, NC Agricultural Development and Farmland Preservation Trust Fund, a local government agency, a private land trust) in return for giving up valuable rights on the land, the funding agency will become a partner in the project and will typically require certain restrictions be included in the easement. The involvement of a state or federal funding partner could also bring legal resources to the project to help defend an easement, if and when a violation occurs or a condemnation is proposed. Tax considerations and funding partner requirements will have a great impact on the particular language used in the WLCE

*Goals.* During the preliminary discussions between the grantor and grantee, each party needs to identify clearly their goals and needs, and ensure that there are shared objectives that can be met by entering into the WLCE agreement. Grantees need to determine their programmatic goals and objectives for holding WLCEs, while also considering the resources they have available to uphold the stewardship responsibilities associated with holding a conservation easement. An evaluation of programmatic goals will help the grantee consider the merits of each WLCE project and establish a prioritization of which projects to pursue. Grantees need to also understand the goals of the landowner from the beginning of every project.

*Farm Conservation and Forest Management/Stewardship Plans.* Achieving the conservation goals of the WLCE depends on the development and implementation of a Farm Conservation Plan and a Forest Management/Stewardship Plan ("Plans"). The Plans provide detailed information on management of the property and fulfillment of the terms and goals of the WLCE.

*Project Timeline.* The unique nature of each WLCE means that the process to complete a WLCE transaction can take six months to two years, and possibly longer depending on funding

sources. The grantee should advise grantor of this timeline at the beginning of the project to establish realistic expectations.

*Funding Partners.* Agencies that provide money to the grantee to purchase the WLCE from the grantor will frequently require certain language in the WLCE. This language is to ensure that the expenditure of public funds is consistent with the policies of that agency and fulfills the purposes of the funds. Careful drafting will be necessary to incorporate this specific language into the WLCE without creating internal conflicts in the document or with language required by other funding partners if more than one funder is involved. It is strongly advised that the drafter of the easement consult the website for the funding agency(s) and talk with staff at the agency early in the process to ensure compliance with their requirements.

*Drafting.* It is important to use clear and precise language that can easily be understood by successor landowners, and that is specific enough to ensure the conservation values can be monitored for changes that may occur due to violations or natural events. The use of the land subject to a WLCE will change over time, and the WLCE should anticipate this need for flexibility while protecting the conservation values. WLCEs can be written from two basic perspectives:

- prohibited uses are expressly stated, and any other uses not listed are permitted, or
- permitted uses are expressly stated, and any other uses not listed are prohibited.

Examples of both perspectives are included in this manual.

*Duration of Easement.* WLCEs can be term or perpetual in duration. Term easements restrict the property for a term of years, expiring at the end of the stated term. Term easements do not qualify for federal or state tax incentives. Also, many easement funding programs only fund permanent easements.

Much of the information included in this document is related to permanent easements. If the reader is interested in term easements, it is recommended that additional information and examples be referenced.

*Tax Incentives and Compliance.* A federal tax deduction and a state tax credit may be available to a landowner that donates all or a portion of the value of a permanent WLCE. A federal tax deduction does not necessarily qualify a donation for a North Carolina tax credit. Grantees should have a working knowledge of the current federal and state charitable contribution requirements. However, grantees should not give the landowner tax advice. At the beginning of every project, grantees should recommend that the landowner seek independent, professional legal and accounting advice and have the WLCE draft reviewed by professionals.

There is increasing scrutiny of conservation easements by the IRS and North Carolina, so both parties should be aware of the rules and limitations of the tax benefits. If the landowner is seeking federal or state tax benefits, the tax law requirements will control how the WLCE is drafted. The WLCE will need to state specifically one or more of the public benefits identified under the tax laws that the WLCE will protect. This public benefit must be protected and maintained in perpetuity. Information on both federal and North Carolina tax benefits is available at:

- <http://www.irs.gov>; and
- <http://www.onencnaturally.org/pages/ConservationTaxCredit.html>).



*Baseline Documentation Report.* A Baseline Documentation Report (BDR) is a record of the condition of the property at the time the conservation easement is granted (“baseline”) in order to form the basis of future monitoring and enforcement, if necessary, over time. A BDR provides critical information that is not necessarily found in the conservation easement, including maps and photographs of the protected property, a full description of the values being conserved and existing manmade improvements, management plans and other information critical to understanding the property.

*Monitoring.* WLCE involve “monitoring.” Monitoring is the easement holder’s ongoing obligated responsibility for inspection of land protected by a WLCE to determine compliance with the terms of the WLCE. Monitoring ensures the protection of the land’s conservation values over time. One of the variables affecting the difficulty of monitoring an easement is the number and type of reserved rights.

*Easement Templates.* A grantee may develop and adopt standard permitted and prohibited uses that meet the grantee’s goals, capacity, and needs, and incorporate these into a standard WLCE template. This may reduce transaction costs, especially legal costs, and could simplify WLCE monitoring. If using a template, the grantee needs to be careful to address the unique aspects of each property.

*Resource Manual.* In 2009 the North Carolina Association of Soil and Water Conservation Districts developed the “Working Lands Preservation Resource Manual” that has been provided to each SWCD. The Resource Manual contains extensive information on WLCEs, including easement drafting, obtaining funding for acquisition and stewardship, a glossary of terms at Chapter 10, and other relevant information. A copy of the Manual is held at each SWCD office and will be updated frequently as new resources are made available.

*Sample Easements.* Appended to this document is a set of completed WLCEs examples representing some of the differences that can be found in content, language, and purpose among WLCEs. These examples include those entered into by land trusts, the Clean Water Management Trust Fund, the USDA Farm and Ranchland Preservation Program, the USDA Lands Legacy Program, and the NC Agriculture Development and Farmland Preservation Trust Fund. While these examples provide excellent reference information, each one was developed for a specific project and in no way are provided as templates. They should not be replicated in their entirety as they are unique documents developed for a specific situation and the respective grantor and grantee.

*Specific Sample Language.* Articles IV through VII contain examples of language options for WLCE provisions. The language is organized under section headings typically found in a WLCE.

\* This language represents only a portion of the language needed in a WLCE and does not represent all of the possible language options.

\* The examples are mostly drawn directly from WLCEs that were written to satisfy project specific requirements. Therefore specific references may not apply to every project, but the general intent may be worth considering.

\* Many of these examples do not represent language that will be required by various the funding sources. It is important to work with the funding agency when drafting the WLCE to ensure the language meets all parties’ needs.

#### IV. RECITALS

The recitals are the factual statements at the beginning of all conservation easements. The recitals contain information that is unique to each project, and great care should be taken to ensure that the recitals for every conservation easement are accurate in all respects. The recitals are very important for qualifying the grantor's conservation easement donation for federal and state tax benefits. The appended WLCEs provide examples of the various recital drafting styles. The recitals usually contain the following categories of information:

*Legal Description of Property.* This often references an "Exhibit A" and may describe certain areas of a master tract excluded from the WLCE, such as a residence. If the WLCE encumbers only part of a larger property, the document will need to describe the entire tax parcel and the specific area(s) encumbered by the easement.

*Description of Grantee.* This is a statement that the grantee is a "qualified conservation organization" and "eligible donee" under federal tax law. The grantee must have the resources to monitor and enforce the WLCE as required by IRS code.

*Funding Partners.* If applicable, a description of the funding partners and grant information should be included.

*Baseline Documentation Report.* A description of or reference to the Baseline Documentation Report prepared for the project. This natural resources inventory is required under the federal tax regulations for WLCEs, and the grantor has to certify in writing that the report is an accurate description of the property at the time of the transfer.

*Conservation Values.* A description of the characteristics of the property that the WLCE is intended to conserve.

*Conservation Policies.* Using specific references to legislation, a list of the clearly delineated federal, state and/or local governmental conservation policies that the WLCE will serve. A recognized conservation purpose under the federal tax law is the preservation of open space, such as farmland, pursuant to a clearly delineated governmental conservation policy. This is often the primary conservation purpose of a WLCE.

*Conservation Purposes.* A clear statement that the purpose of the WLCE is to protect in perpetuity the identified conservation values (examples follow in Section IV). The statements of the conservation values and conservation purposes of the WLCE should reflect the grantee's goals and objectives. The drafter should ensure that the conservation purposes protected by the WLCE are measurable, clearly defined, and able to be monitored over time.

This statement must substantiate that the WLCE fulfills conservation purposes recognized by the federal and state tax laws in order to qualify for tax benefits. Conservation purposes recognized by the IRS for the federal tax deduction include:

- preservation of land for public outdoor recreation or education;
- protection of relatively natural habitats of fish, wildlife, or plants;

- preservation of open space, including farm and forest land, for the scenic enjoyment of the general public or pursuant to a clearly delineated governmental conservation policy, provided such preservation will yield a significant public benefit; and
- preservation of historically important land or buildings.

In order to qualify for the federal tax deduction, the WLCE must protect the specific conservation values noted in the WLCE and support the conservation purposes of the WLCE, and must prohibit any uses that are destructive of “significant conservation interests”, even if those values are not specifically intended to be protected by the WLCE. Some WLCEs will include a broad, general statement to this effect.

Conservation purposes recognized under North Carolina’s Conservation Tax Credit Program are, among others, the conservation of farm or forestland. There are certain requirements for a working lands easement to qualify to a state tax credit. Please visit the website for information: <http://www.onencnaturally.org/pages/ConservationTaxCredit.html>.

Funding sources may require certain policy and purpose statements.

## **V. CONSERVATION PURPOSES**

This Article contains examples of language specific to the conservation purpose clause.

**Following are examples taken from different WLCEs specific to describing the WLCEs Conservation Purposes.**

### **A. Agriculture as the primary conservation purpose.**

The Property consists primarily of productive agricultural land [and/or forest land]. The majority of the soils on the Property have been classified as [“prime,” “statewide importance,” or “local importance”] soils by the Natural Resource Conservation Service (NRCS). It is the primary purpose of this WLCE to protect the agricultural soils, agricultural viability, and productivity of the Property in perpetuity. The property also has outstanding scenic qualities, wildlife habitat and open space character.

### **B. Agricultural and natural resource conservation as conservation purposes.**

By obtaining this WLCE, it is the intent of the Grantee to perpetually protect and preserve agricultural lands, encourage sound soil management practices in accordance with normally accepted agricultural practices, preserve natural resources, maintain land in active agricultural use, and ensure affordable resale values of agricultural land.

OR

It is the purpose of this WLCE to preserve the open space, natural, scenic and agricultural values of the Property and to prevent any uses of the Property that will significantly impair or interfere with those values. This purpose, as further defined by the provisions of this Agreement, is generally referred to collectively herein as “the conservation purpose of this Agreement.

OR

The purposes of this WLCE are to preserve the agricultural viability of the Property, to protect prime farmland soils and soils of statewide and local importance and to protect and preserve the cultural, wildlife, open space and other Conservation Values of the Property. An additional purpose of this WLCE is to protect wetlands, riparian area and surface waters within the watershed where the Property is located, to the end that the waters flowing over it and the waters into which those waters flow may be preserved in quality and protected in their present uses, without the deleterious effects that may arise from the uses or development of the Property, which are prohibited herein.

**C. Agriculture as primary purpose, other purposes only if they do not conflict with primary purpose.**

It is the primary purpose of this Working Lands Conservation Easement to enable the Property to remain in agricultural use by preserving and protecting its agricultural soils and agricultural viability and productivity. No activity which shall significantly impair the actual or potential agricultural use of the Property shall be permitted. To the extent that the preservation and protection of the natural, historic, recreational, habitat or scenic values referenced in this Easement are consistent with the primary purpose stated above, it is within the purpose of this Easement to also protect those values, and no activity which shall significantly impair those values shall be permitted.

**D. Agriculture as primary, scenic and natural resources secondary.**

Grantor and Grantees acknowledge that the Purposes of this WLCE are as follows (hereafter "Purpose of WLCE"): 1) Consistent with the goals set forth in [legislative policy references], the primary purpose of this WLCE is to conserve productive agricultural and forestry lands in order to facilitate active and economically viable farm use of the Protected Property now and in the future; 2) as a secondary objective, to conserve scenic and natural resources associated with the Protected Property, to improve the quality of life of North Carolina residents and to maintain for the benefit of future generations the essential characteristics of the North Carolina countryside [add recreational or educational goals as relevant]; 3) these objectives will be advanced by conserving the Protected Property because it possesses the following attributes: [relevant to each farm property, include agricultural or forestry values (soils), natural areas, wetlands, and habitats; historic features; rivers, streams or ponds; trails or paths used by the public; visibility of the property from public places; proximity to public or other protected lands; and any other relevant features of the property].

COMMENTARY. The better conservation purpose clause will expressly state the perpetual nature of the conservation purpose. In any event, the WLCE must make clear that the duration of the easement is perpetual in order to qualify for federal and state tax benefits.

**VI. DEFINITION OF AGRICULTURE**

This Article contains sample language illustrating the various ways to address the definition of agriculture. The WLCE drafter may include a specific definition for agriculture in the context of the description of the conservation purposes. Many WLCEs do not include a specific definition of agriculture because agriculture evolves over time and specifically defining agriculture today may preclude uses that should be allowable in the future. If a definition of agriculture is included, it should be broad enough to avoid contradicting the conservation purposes or limiting unforeseen agricultural uses that should be permissible under the easement.

**Following are examples taken from different WLCEs specific to defining “Agriculture”.**

**A. Agriculture defined by use of North Carolina specific statutory definition.**

As used in this Easement, the terms "agriculture", "agricultural", and "farming" shall have the meanings given to them in N.C.G.S. § 106-581.1, as follows:

(a) The cultivation of soil for production and harvesting of crops, including but not limited to fruits, vegetables, sod, flowers and ornamental plants.

(b) The planting and production of trees and timber.

(c) Dairying and the raising, management, care, and training of livestock, including horses, bees, poultry, and other animals for individual and public use, consumption, and marketing.

(d) Aquaculture as defined in N.C.G.S. §106-758.

(e) The operation, management, conservation, improvement, and maintenance of a farm and the structures and buildings on the farm, including building and structure repair, replacement, expansion, and construction incident to the farming operation.

(f) When performed on the farm, "agriculture", "agricultural", and "farming" also include the marketing and selling of agricultural products, agritourism, the storage and use of materials for agricultural purposes, packing, treating, processing, sorting, storage, and other activities performed to add value to crops, livestock, and agricultural items produced on the farm, and similar activities incident to the operation of a farm.

COMMENTARY. A statutory reference could be specifically incorporated by reference to avoid simply restating existing law. For example, such a definition would read “As used in this Easement, the terms "agriculture", "agricultural", and "farming" shall have the meanings given to them in N.C.G.S. § 106-581.1 which is incorporated herein by reference, as such statute may be revised from time to time.” Note the limitations of this definition. Certain activities like processing (on-site value added activities), sale on site, and agritourism do not fall under this definition, and the drafter would need to address those activities separately. The WLCE should be clear about whether forestry is included within the definition of agriculture used in the document.

**B. Agriculture defined broadly without specific statutory or regulatory reference.**

Grantor reserves to himself/herself, and to his/her heirs, successors and assigns, the right to engage in any and all agricultural uses of the Property in accordance with sound, generally accepted agricultural practices consistent with [section of easement]. For the purposes of this Easement, “agricultural uses” shall be defined as: breeding, raising, pasturing and grazing livestock of every nature and description, breeding and raising bees, fish, poultry and other fowl; planting, raising, harvesting and producing agricultural, aquacultural, horticultural and forestry crops and products of every nature and description; and the primary processing, storage, and sale, including direct retail sale to the public of crops and products harvested and produced principally on the Property.

OR

For the purposes of this Conservation Easement, agriculture includes, by manner of illustration, but is not limited to, row cropping, dairy farming, animal husbandry, cattle grazing, horticultural and silvicultural uses of the land. Except as specifically permitted herein, no activity that shall significantly impair the potential agricultural use on the Property shall be permitted.

COMMENTARY. Again, note the limitations of these two examples. If the WLCE is drafted from a prohibitive fashion, and, for example, agritourism is not specifically permitted, then it is prohibited, and the landowner cannot conduct any agritourism on the property. This illustrates that great care is necessary in defining terms and setting out the permitted and prohibited uses, and it illustrates the danger of being overly specific.

## **VII. RESERVED RIGHTS AND PROHIBITED USES**

This Article provides sample language for various reserved rights and prohibited uses. These sections are some of the most important in a WLCE because they establish the permitted and prohibited uses in order to protect the conservation values of the WLCE. Along with the recitals (including the description of conservation values and purposes), the conservation purposes section typically requires the most intensive drafting because of unique aspects of each property. Some WLCEs have separate sections for reserved rights and prohibited uses, rather than combining them into one section. The terms in this section can include provisions that specify the requirements that must be met for certain activities to be permitted. Consideration should be given to achieving balance in the permitted and prohibited uses that conserve the soil and water resources, but that will also allow for future sustainable agriculture when the land is farmed under differing economic and land use conditions.

### **A. Conservation Plans and Best Management Practices.**

COMMENTARY. It is highly recommended that the WLCE require that farming operations be conducted according to a conservation plan that is designed to protect to conservation values of the property and uphold the conservation purposes of the WLCE. The plan should be written in accordance with sound best management practices in accordance with the USDA Natural Resources Conservation Service Field Office Technical Guide or other applicable policies as adopted by the NC Soil and Water Conservation Commission. The WLCE should require that the conservation plan be developed by a qualified conservation planner such as NRCS personnel, SWCD staff, or other applicable agencies or a qualified private consultant. The conservation plan relieves the grantee from overseeing the day to day operation of the farm. The existence of the plan, however, does not mean that the grantee can forgo monitoring the property for compliance with the WLCE. The grantee will need to decide whether it will require the approval of the preparer of the plan, who is an acceptable preparer of the plan, the standards to which the plan must be prepared, and when the plan will have to be updated. The grantee also needs to determine whether it will specify the contents of the plan. The first example below is more general about the required contents, and the second example more specific. Funding sources and the NC Conservation Tax Credit Program may also have specific conservation plan requirements.

### **Following are examples taken from different WLCEs specific to Conservation Plans and BMPs.**

All farming operations shall be conducted substantially in accordance with a conservation plan that addresses soil and water conservation, pest management, nutrient management and habitat protection recommended/prepared by the Natural Resource Conservation Service, Soil & Water Conservation District, or other government entity charged with oversight of such activities or a qualified private

consultant. This plan shall be updated at least every ten years, whenever the basic type of agricultural operation on the Property changes, and at the time ownership of the Property changes. It shall be the responsibility of the Grantor to insure the preparation and periodic updating of the conservation plan provided for in this paragraph and to provide a copy of the conservation plan to Grantee whenever it is updated or revised.

OR

Grantee agrees to conduct all agricultural use of the Property in accordance with a Conservation Plan (the Plan) developed by leading governmental authorities approved in advance by Grantee such as the Natural Resource Conservation Service (NRCS) or its successors, the local soil and water conservation district, or other designated parties such as the Carolina Farm Stewardship Association or a qualified private consultant, as recognized by NRCS, the Soil & Water Conservation Commission, or other designations recognized by federal or state agencies. The Plan should address and provide for the following: soil and water conservation including quality and quantity; pest management; floodplain protection; watershed protection; protection against non-point source runoff; nutrient management; minimization of air quality impacts; habitat protection; and, maintenance of the aesthetics of traditional or existing agriculture. The Plan shall incorporate agricultural Best Management Practices guidelines according to the NRCS Field Office Technical Guide (or similar guide produced by a successor agency), the North Carolina Soil and Water Conservation Commission policies, and all other applicable federal, state, and local rules and regulations. The Plan shall be updated at least every ten years, or when a transition in type of farming occurs or upon a change in ownership. It shall be the obligation of the Grantor to ensure the Plan is updated as stated above and provide copies to the Grantee and the local soil and water conservation district. Any changes in future farming practices shall be permitted so long as they are consistent with Plan as amended and the intent and Purposes of this Conservation Easement, and do not in any way materially impair or interfere with the Conservation Values of the Property.

COMMENTARY. Confined animal feed operations raised several fundamental questions for the Working Lands Subcommittee - Would accepting WLCEs allowing CAFOs promote or conflict with the grantee's policies, or with the governmental policies supporting the funding and tax benefit programs? Can a WLCE allow a CAFO to operate while protecting the WLCE's conservation purposes? Are CAFOs farmland? Is there a meaningful difference between a CAFO (which may not be acceptable to a grantee) and an animal feeding operation (which may be acceptable to a grantee under certain circumstances)? It is likely that any CAFO allowed will draw attention from the North Carolina Conservation Tax Program for these reasons. Where the parties agree to permit a CAFO, the draft WLCE should be submitted to the North Carolina Conservation Tax Program for review prior to closing if the grantor intends to seek the tax credit.

## **B. Forest Management and Commercial Forestry.**

COMMENTARY. It is recommended that the easement drafter talk with a registered forester, the NC Department of Forest Resources and/or the NC Forestry Association to ensure appropriate language and options are included in the WLCE. It is also important to address any requirements a funding agency may have related to forest management. If there are forest resources on the property, it is highly recommended that the WLCE

should require the preparation of a Forest Management/Stewardship Plan by a North Carolina registered forester, a wildlife biologist, or by another qualified person approved in advance by the grantee. The WLCE should include language referencing Best Management Practices as provided by the North Carolina Division of Forest Resources or its successor agency. The forester should draft the plan in the context of the WLCE and its limitations, and the plan should reference the WLCE. The drafter should use the definitions for terms like “forestry,” “forest management,” and “commercial forestry” provided by the Society of American Foresters (<http://www.dictionaryofforestry.org/>) in an effort to avoid later misunderstandings about what is permitted and prohibited. The appended WLCE between the Tinsleys and Land Trust for the Little Tennessee, Inc. contains very specific forestry provisions, including definition examples.

**Following are examples taken from different WLCEs specific to forest management and commercial forestry:**

1. Timber harvest permitted without Grantee approval.

Notwithstanding any provision in this Conservation Easement to the contrary, Grantor retains the right, without seeking the Grantee’s prior review, to remove damaged, diseased or dead trees, to remove trees in connection with construction activities permitted herein, to remove trees in connection with the agricultural activities permitted herein, to remove trees that present a hazard to persons or property, and to remove trees for the cutting of firewood, posts, lumber, and poles for non-commercial uses.

OR

Subject to the Easement, selective tree or vegetation cutting is permitted to maintain existing fences and trail and road access, to enhance fire protection, to provide firewood for Grantor’s personal use and to promote conservation management purposes. Conservation management purposes include, but are not limited to, prescribed burns or practices conducive to propagation and retention of native plants and wild population of game and non-game species and removal of non-native plants.

2. Forestry operations in riparian buffer.

There shall be no cutting or removal of trees, or the disturbance of other natural features within the Riparian Buffers except for the following: (1) as incidental to boundary marking, fencing and signage, (2) to construct and maintain permitted foot trails for hiking and nature observation, and (3) to prevent personal injury and property damage. Selective cutting and prescribed burning or clearing of vegetation and the application of pesticides for fire containment and protection, disease control, and the restoration of hydrologic resources, wetlands enhancement and/or control of non-native plants, are permitted with the prior written approval of the Grantee.

OR

Timber harvest in the Riparian Buffer is permitted as long as it such harvest is conducted in a manner reasonably calculated to minimize the impact on the conservation values protected by this WLCE, in accordance to all applicable laws and regulations, and following Best Management Practices as provided by the North Carolina Division of Forest Resources or its successor agency.



3. Forestry management and harvest permitted with Forest Management/Stewardship Plan.

COMMENTARY. Where there are riparian buffers on the property, special care should be taken to address what types of forest management are permitted and prohibited in the buffers, especially where the WLCE generally permits commercial forestry.

Grantor retains the right to conduct forest management and commercial forestry in a manner that provides for sustained flow of renewable forest products. Forest management and commercial forestry must be conducted in accordance with (i) the Conservation Plan, (ii) a written Forest Management/Stewardship Plan (hereinafter referred to as the "Forestry Plan"), (iii) the currently available North Carolina Forest Practices Guidelines (e.g., 15A NCAC 11.0101-.0209), as outlined in the Forestry Best Management Practices Manual, and (iv) all other applicable county, state, and federal forestry laws and regulations as they may apply to the specific timber harvest activities. The Forest Management/Stewardship Plan must be prepared by a North Carolina registered forester and approved in writing by Grantee prior to any forest management activities or timber harvest. The Plan must be updated and re-approved by Grantee at least every ten (10) years so long as Grantor wishes to continue to actively manage the forest or harvest forest products and upon a change in the ownership of the Property.

OR

Prior to the commencement of any timber harvest or other forest management activities, a Forest Management/Stewardship Plan approved by the Grantee is required. The Forest Management/Stewardship Plan and any update or amendment to the Forest Management/Stewardship Plan shall be prepared by the North Carolina Division of Forest Resources, a forester registered in North Carolina, or other person approved in advance by Grantee. The Forest Management/Stewardship Plan shall be consistent with the purposes of this Conservation Easement and shall reference this Conservation Easement. The Forest Management/Stewardship Plan shall have been prepared not more than ten (10) years prior to the date any timber harvesting is expected to commence, or shall have been reviewed and updated as required by a qualified person as required above at least thirty (30) days prior to said date. The Forest Management/Stewardship Plan shall include at minimum: (1) landowner objectives; (2) timber harvest goals; (3) an appropriately scaled, accurate map indicating such items as forest stands, streams, wetlands, major access routes, and topographic contours; (4) forest stand descriptions, including but not limited to, stocking levels, stand quality, soils, insect and disease occurrence, previous management history, and prescribed silvicultural treatment; (5) water quality considerations for the [name of watercourse]; (6) plant and wildlife considerations; and (7) aesthetic and recreational considerations. The Forest Management/Stewardship Plan shall be updated at least once every ten (10) years if Grantor intends to harvest timber or other wood products. Amendments to the Forest Management/Stewardship Plan shall be required if Grantor proposes a silvicultural practices that is not included in the approved Forest Management/Stewardship Plan, but no such amendment shall be required for any change in timing or sequence of treatments if such change does not vary more than five (5) years from the prescription schedule set forth in the approved Forest Management/Stewardship Plan. In the event that any forest stand is substantially damaged by natural causes such as insect infestations, disease, ice, fire, or wind, Grantor may elect to conduct an alternative treatment for the affected forest stand, in which event Grantor shall submit an amendment to the Forestry Plan for Grantee's approval prior to conducting any alternative treatment. The Grantor shall provide to the Grantee a copy of the Forest Management/Stewardship Plan and any updates or revisions.

4. Harvest Plan and notice of harvest required, contractor requirements.

a. *Timber Harvest Plan.*

A Harvest Plan prepared by a registered or otherwise qualified forester, approved in advance by the Grantee, must be submitted to Grantee for its approval at least thirty (30) days prior to any commercial harvest of timber. No commercial silvicultural activity may occur until the Forest Management/Stewardship Plan and a more specific Harvest Plan have been approved in writing by Grantee. The Harvest Plan shall be prepared prior to any commercial timber harvest and must address the nature and scope of harvest activity (size and location of area to be logged; prescribed silvicultural treatment; equipment to be used; and major access routes including haul roads, landing, major skid trails, and stream crossings), appropriately scaled and accurate maps, a summary of activities and practices intended to achieve compliance and accordance with the requirements of the Forest Management/Stewardship Plan, the WLCE and the current NC Forestry BMPO manual

b. *Notice of harvest.*

COMMENTARY. The grantee may want to require that the grantor provide the grantee notice of an upcoming timber harvest in order to monitor the harvest and compliance with the terms of the WLCE. The federal tax rules require that the grantor receive prior written notice of any activity by grantee that could have an adverse impact on the conservation values. Certain funding sources may prohibit the grantor from requiring notice of harvest. In these cases, the grantor may indicate that the timber harvest is permitted without notice to grantor.

Grantor shall provide Grantee with a written Notice of Harvest (Notice) at least ----- business days prior to scheduled commencement of harvesting activities. Such Notice shall include the name of the registered forester supervising the harvest, the timber buyer and/or logger, planned date for commencement of harvesting activities, and the Harvest Plan. If commencement of harvesting activities is delayed by more than fifteen business days (three calendar weeks) past the date specified in the Notice, Grantor shall notify Grantee, either by written or verbal communication, of each such delay and shall provide Grantee with each planned date for commencement of harvesting activities..

OR

Grantor shall provide Grantee with a written or verbal Notice of Harvest 24 hours prior to the scheduled commencement of harvesting activities.

c. *Supervision of harvest.*

Timber harvesting shall be supervised by a forester registered in North Carolina, and conducted within the constraints of the Forest Management/Stewardship Plan and the Harvest Plan under a written contract with a timber buyer and/or logger. Such contract shall specify relevant requirements for compliance with this Conservation Easement and the Grantor is encouraged but not required to obtain a performance bond for compliance with the terms hereof.

5. Forest roads permitted.

COMMENTARY. It is important to address the maintenance of existing roads or the construction of new roads comprehensively in the forest management/stewardship plan.

The Grantor retains the right to maintain, repair, and replace existing forest management roads and associated bridges and culverts, together with the right to construct new forest management roads and associated improvements provided that such new roads and associated improvements fulfill the following requirements: (a) such construction is consistent with the Purposes of the Grant; (b) additional road improvements are necessary to provide reasonable forest management access to the Property and the system of existing roads is not adequate, and (c) such construction is in compliance with then currently available North Carolina Forest Practices Guidelines (e.g., 15A NCAC 11.0101-.0209).

OR

Grantor may maintain the existing farm roads in the Easement Area so long as such roads continue to be made of pervious materials and the maintenance thereof complies with the Conservation Plan. Construction and maintenance of new unpaved farm roads that may be reasonably necessary and incidental to carrying out the improvements and uses are permitted in the Easement Area with the prior written approval of Grantee as to location and width.

**C. Mining and Excavation.**

COMMENTARY. WLCEs typically seek to protect soil and water quality as primary conservation values. Surface land disturbance related to any type of excavation, dredging, or leveling of soils can degrade soil and water quality, and thoughtful consideration should be given when negotiating Grantor's reserved rights to ensure that permitted activities do not degrade the conservation values. Groundwater mining – the withdrawal of groundwater for bottled water production – is an additional mining practice that could potentially affect conservation values associated with groundwater levels and water quality. Mining is addressed directly in the federal tax regulations, and as a general rule, a donation of a WLCE will not qualify for the federal income tax deduction if the grantor reserves the right to conduct surface mining activities or any other mining activities that are inconsistent with the conservation purposes. Gravel extraction has been held to constitute surface mining (see Great Northern Nekoosa Corp. v. U.S., 38 Fed. Cl. 645 (1997)). Therefore, grantees should be exceptionally careful when drafting provisions dealing with any type of mining or sand or gravel extraction. It is highly recommended that the grantee seek legal counsel on this issue because the tax regulations are so stringent and nuanced.

**Following are examples taken from different WLCEs specific to Mining and Excavation.**

1. Land disturbance not permitted, except for carrying out permitted agricultural uses and improvements.

There shall be no filling, dredging, mining or extraction of soil, sand, gravel, rock, oil, natural gas, fuel, or any other mineral substance, and no change in the topography of the Easement Area in any manner, except as necessary for the purpose of combating erosion or flooding in accordance with the Conservation Plan and as reasonably necessary and incidental to carrying out the improvements and agricultural uses permitted on the Property by this Easement.

2. Tiling, drainage and sand and gravel extraction permitted with prior approval of grantee.

The easement prohibits filling, excavation, removal of topsoil, sand, gravel, rocks, or minerals, or any change to topography unless the change is necessary to carry out the uses otherwise permitted by the conservation easement. Because one purpose of the easement is to encourage agricultural uses, tiling and drainage improvement are permitted. Surface mining is expressly prohibited. In rare cases and under specific conditions, sand and gravel extraction for forestry or agricultural use on the property may be permitted with prior written approval of the Grantee.

OR

The Grantor is permitted to take gravel from the Property and to maintain gravel pits, for the purposes of obtaining gravel to maintain the existing roads and travelways on the Property and for building and maintaining those additional roads and travelways on the Property as may be permitted by the easement, provided however that gravel may not be taken from any location in the watershed in a manner that will cause demonstrable decrease in water quality or stream flow or a material interference with the natural habitat values of the property.

COMMENTARY. As discussed above, this type of provision may disqualify the WLCE for a federal tax deduction and grantee and grantor should obtain legal advice on this point. The drafter may want to include language that prohibits any activity in contravention of the relevant Treasury Regulations. This drafting technique, however, only postpones the decision about what is permitted, but may prevent the WLCE from being disqualified for the federal deduction simply by including language permitting gravel extraction, whether or not the grantor actually extracts gravel.

3. Subsurface exploration and mining permitted with approval of grantee.

The exploration, development, mining, or extraction of soil, sand, gravel, mineral, oil, gas, or any other hydrocarbon substance from the surface of the Property is prohibited. However, subsurface exploration and extraction of oil, gas, and minerals may be conducted utilizing techniques and methods that result in only a temporary disturbance to the surface of the soil, as determined by the Grantee, if Grantee also determines that such activities are consistent with conserving and maintaining the viability of the conservation values, and Grantee provides Grantor, in advance and in writing, approval subject to the terms and conditions Grantee determines are necessary to ensure the protection of these conservation values, including, but not limited to, requiring that all structures are located beneath the soil surface and that any disturbed surface is restored promptly to [describe original condition]. Subsurface extraction of gas, oil, and minerals may be conducted by off-site methods (such as slant drilling) that do not impact the surface of the property or otherwise impair the conservation values. Any extraction permitted pursuant to this paragraph shall be conducted in compliance with Federal, State, and local regulations and permits.

COMMENTARY. Certain types of subsurface mining are permitted under the regulations governing the deductibility of a donated WLCE if those activities have only a localized impact, are not irretrievably destructive of the conservation values, and the land will be restored to its natural state after the mining activities are completed. Consider limiting the area that can be affected, e.g. no more than 2% of the surface area of the property shall be disturbed, or no more than 3 one acre pads shall be constructed. The WLCE should require restoration of the land after the mining is completed. It is also important to recognize that allowing such activities, if approved, would require increased monitoring and oversight by the Grantee to ensure compliance.

#### **D. Agricultural Buildings and Housing.**

COMMENTARY. Grantees will often need to determine how to handle the existing buildings on the property and address grantor's need to construct new buildings in the future. Depending on the grantee's goals and the circumstances, the grantee may exclude building areas from the easement area, or include them in the easement by addressing them with certain language. Where there are buildings or other structures are within the easement area, or are permitted to be constructed within the easement area, the WLCE should address buildings in the context of the following considerations that may affect the conservation values. If the project is receiving agency funding, it is important to be familiar with their restrictions/allowances related to agricultural buildings and housing.

An increasingly popular approach to addressing conservation of soil and water resources in WLCEs is to limit the amount of "impervious surface" in the easement area to a certain percentage. Impervious surface is defined as an area covered by impenetrable materials such as asphalt, concrete, brick and stone, which seal surfaces, repel water and prevent precipitation and melt water from infiltrating soils. Impervious areas are usually constructed surfaces (e.g., rooftops, sidewalks, roads, parking lots), but compacted soils can also be highly impervious.

Many WLCEs use "building envelopes to limit building to designated areas within the easement area, thereby preventing building from occurring in areas that would compromise the conservation purposes of the WLCE. Building envelopes can be "fixed" at a specific location within the easement area, or can be "floating" which means that the final location can be selected from within a given area, often requiring approval by the grantee. Minimizing the impact on the conservation values should help determine an appropriate location and size for the building envelope. For any fixed building envelope, the location of the building envelopes should be shown by metes and bounds on the recorded easement survey or on an attachment to the easement to prevent any confusion in the future about the location.

In all instances it is important to consider the potential impact if the permitted structures are constructed. For example, what if the building envelope is located far from existing roads and requires the construction of a new road that will bisect the entire property? Also, recognizing the importance of maintaining access to prime soils for agricultural production, building envelopes should not be sited over prime soils. Further, keep in mind the goal of water quality protection and do not allow new construction to be located too close to waterways.

The following table sets out some common considerations for structures in WLCEs and possible ways to address those considerations.

<b>Consideration</b>	<b>How to address</b>
Building footprint	<ul style="list-style-type: none"> <li>• Impervious surface limit</li> <li>• Footprint square footage limits, per building and aggregate</li> <li>• Limited to a maximum percentage of impervious surface in relation to the total size of the property</li> </ul>
Building appearance, massing and scale	<ul style="list-style-type: none"> <li>• Impervious surface limit (% of total property, would include roads)</li> <li>• Floor area square footage limits, per building and aggregate, distinguish heated and non-heated</li> <li>• Height limits</li> </ul>
Location of buildings	<ul style="list-style-type: none"> <li>• Outside or inside CE</li> <li>• Building envelope</li> <li>• Floating envelope</li> </ul>
Utilities location and installation	<ul style="list-style-type: none"> <li>• Limit on location</li> <li>• Address perc test</li> <li>• Prohibit utility installation for benefit of other properties</li> </ul>
Subdivision	<ul style="list-style-type: none"> <li>• Permitted or prohibited?</li> <li>• Only permitted if required by law, cannot sell separately from easement area</li> </ul>
Purpose and use	<ul style="list-style-type: none"> <li>• Restrict to permitted agricultural activities, single family residential use, farm support housing</li> <li>• Use limitations should be consistent with permitted and prohibited uses</li> </ul>

There may be compelling reasons to treat agricultural buildings, single family homes, and farm support housing differently and in separate sections of the WLCE. Because the concepts are the same, the examples below can be adapted to address one or more types of structures depending on the circumstances.

**Following are examples taken from different WLCEs specific to Agricultural Buildings and Housing.**

1. Maintenance of existing structures permitted without grantee’s prior permission.

Grantor may remove, repair or replace existing [Agricultural Buildings and Improvements] located on the Property without prior permission of the Grantee.

COMMENTARY. With this type of provision referring to existing structure without a building envelope, detailed baseline documentation (including extensive photo-documentation) becomes critically important as a future reference for determining the nature of the buildings “existing” at the time the easement was granted.

2. Limited new agricultural building construction permitted with notice to grantee, approval required if construction exceeds size limitation, no building envelope.

New Agricultural Buildings, or the enlargement of existing Agricultural Buildings, within the Easement Area are permitted with prior written notice to the Grantee to ensure such construction does not result in an aggregate building footprint exceeding \_\_\_\_ square feet. Grantor may enlarge or construct Agricultural Buildings in the Easement Area resulting in an aggregate building footprint exceeding this \_\_\_ square foot threshold only with the prior written permission of Grantee [pursuant to permission section].”

3. New construction permitted with prior approval from grantee, no building envelope.

Grantor shall have the right to construct and maintain barns or similar structures or facilities together with necessary access drives and utilities on the Protected Property, provided that they are used exclusively for agricultural or forestry purposes, and provided further that such construction has been approved in writing in advance by the Grantee. Grantee’s approval shall not be unreasonably withheld or conditioned, provided the structure or facility is located in a manner which is consistent with the Purposes of this [Easement] as stated in [the Purposes section of the easement], above.

OR

Grantor may construct one Residence on the portion of the Property located east of [said road] as depicted on the [Baseline documentation map], in a location designated by Grantor and approved by Grantee, which approval shall not be unreasonably withheld. Grantee shall grant such approval in writing within thirty (30) days of Grantor’s request unless Grantee determines that the proposed Residence would be unnecessarily located on prime or unique soil (as defined by \_\_\_\_), or would otherwise materially diminish the agricultural productivity of the Property.

4. Construction permitted in building envelope without prior approval from Grantee.

Grantor has the right to maintain, repair, and enlarge all existing buildings and improvements and to construct, maintain and repair new buildings and other improvements within the [Building Envelope]. Said structures shall be used solely for agricultural purposes or other purposes directly related thereto, including but not limited to the processing or sale of farm products, in accordance with sound agricultural practices or such successor law as is later promulgated. Notwithstanding the provisions of this Section, said structures may be adaptively used for farm labor or tenant housing as defined in Section \_\_\_ herein, and/or for non-agricultural home occupations or cottage industries as defined in Section \_\_\_ herein. The land on which these structures stand shall not be subdivided from ownership of the [Building Envelope], except as outlined in Section \_\_\_ herein. Grantor shall give Grantee written notice prior to commencement of construction.

COMMENTARY. Though not addressed in the foregoing example, the construction and installation of utilities to serve any new construction should be addressed and

limited appropriately because the utility installation will likely require land disturbance in the easement outside the building envelope. Utilities are sometimes addressed in a dedicated section of the WLCE. Often the WLCE will distinguish between a utility installation permitted for structures allowed on the property and utility installations for the benefit of other properties.

OR

Grantor has the right to construct and maintain \_\_\_ additional farm labor housing unit(s), together with the necessary driveways, utilities and appurtenant structures or improvements normally associated with a residence, provided, however, that the farm labor housing unit(s) shall be occupied by at least one person who is a member of the Grantor's family or who is employed on the farm. In the event the unit is not required for housing a farm employee or member of Grantor's family, the Grantor may rent the unit to other persons for a lease term not to exceed one year. The farm labor housing unit(s) shall not be conveyed separately from the Protected Property, but may be subdivided with the prior written approval of Grantee if such subdivision is required by state or local regulation. No prior approval of Grantee shall be required for construction of any farm labor housing unit or appurtenant structure or improvement located within the [Building Envelope] described in the preceding paragraph, provided Grantor shall notify Grantee prior to commencing construction on any such housing unit, structure or improvement.

**E. Fences.**

**Following are examples taken from different WLCEs specific to Fences.**

Existing fences may be repaired and replaced, and new fences may be built anywhere on the Property for purposes of reasonable and customary management of livestock and wildlife.

OR

Existing fences may be repaired and replaced, and new perimeter fences may be built, for the purposes of reasonable and customary management of livestock and wildlife and to mark property boundaries, without the permission of the Grantee; provided, however that Grantor shall construct all replacement fences that are located in the Stream Buffer Zone as of the date hereof at least \_\_\_ feet from the top of the bank of the stream as shown on the Baseline Documentation Report. Fences for the purpose of protecting any pond, permanent or intermittent watercourses in the Easement Area are also permitted. Fences constructed to keep livestock out of watercourses in the Easement Area are also permitted.

**F. Construction and Maintenance of Roads.**

COMMENTARY. Easement specific circumstances will often dictate that road provisions be more detailed than the following. In order to protect the conservation values, the grantee may need to address existing and new roads, the use and location of the roads, the construction of the roads, locations of stream crossings, including materials used. In some situations, a poorly located road or stream crossing can have substantial adverse effect on the conservation values. The grantee should also consider limiting grantor's ability to grant use of the road to neighboring property owners whose use may exceed the intended scope of the permitted road.



**Following are examples taken from different WLCEs specific to Construction and Maintenance of Roads.**

1. Road construction generally.

Construction and maintenance of unpaved farm roads that may be reasonably necessary and incidental to carrying out the improvements and uses permitted on the Property by this Conservation Easement are permitted. No portion of the Property shall be paved or otherwise covered with concrete, asphalt, or any other impervious paving material without the advance written permission of the Grantee. The Grantee may not give such permission unless the Grantee determines that the proposed paving, or covering of the soil, or the location of any such road, will not substantially diminish or impair the Conservation Values of the Property.

OR

Farm roads may be built on the Property to access the agricultural structures permitted by the Easement, to access the timber stands identified in the Forest Management/Stewardship Plan, and to access the Excluded Areas, provided they are not paved or otherwise covered with concrete, asphalt or any other impervious paving material, and are located in a way that does not substantially diminish or impair the open space character, agricultural productivity or scenic qualities of the Easement Area.

2. Limits on road construction in riparian buffer.

Additional roads may not be unnecessarily located within the Riparian Buffers. If a road or stream crossing is necessary, best management practices as defined by the North Carolina Division of Water Quality, North Carolina Division of Soil and Water Conservation, or Natural Resource Conservation Service must be used and the construction must be consistent with applicable government authority. All necessary care shall be taken to construct the road or stream crossing in a manner that does not cause or allow sedimentation either during or after construction. At least thirty (30) days prior to the commencement of road construction, Grantor shall provide written notice to Grantee.

**G. Maintenance and Improvement of Water Sources.**

**Following are examples taken from different WLCEs specific to Maintenance and Improvement of Water Sources.**

1. Permitted without permission.

Grantor shall retain and reserve the right to use any appurtenant water rights sufficient to maintain the agricultural productivity of the Property. Grantor shall not transfer, encumber, lease, sell or otherwise separate such water rights from title to the Property itself.

OR

The Grantor retains and reserves the right to use, maintain, establish, construct, and improve water sources, water courses, and water bodies within the Property for the uses permitted by this Easement, provided the Grantor does not materially impair the natural course of the surface water drainage or

runoff flowing over the Property and further provided that it is done in accordance with the Conservation Plan.

COMMENTARY. This example gives the grantor wide latitude to disturb existing watercourses on the property limited only by the Conservation Plan. In this case, the grantee should be sure that the Conservation Plan addresses these issues in detail and minimizes degradation of the conservation values.

2. Pond construction permission required.

The construction of ponds and reservoirs is prohibited unless the Grantor obtains the advance written permission of the Grantee. Any pond or reservoir that is allowed must be constructed in compliance with any and all federal, state, and local rules, regulations or guidelines promulgated by the Army Corps of Engineers, the USDA Natural Resource Conservation Service, the North Carolina Department of Environment and Natural Resources and any other governing authority.

3. Language specific to drainage ditches, stream crossings.

There shall be no dredging, channelizing or other manipulation of natural watercourses existing on the Property as of the date hereof except as may be necessary to maintain existing drainage ways on the Property, including replacement of existing culverts, water control structures, livestock crossings, and bridges; and maintenance of roadside ditches, provided all necessary governmental approvals are obtained.

4. Wells, livestock watering systems.

Other than the construction of wells to serve allowed agricultural improvements, and the construction of livestock watering systems and stream crossings as needed, there shall be no alteration, depletion or extraction of surface waters, natural waterways, marshes, subsurface waters or any other water bodies on the property.

COMMENTARY. When allowing the grantor to conduct land disturbing activities in or near a watercourse, degradation of water quality is likely. The grantee should anticipate this and require construction of any pond, stream crossing, bridge, culvert or other feature to be done in a way that minimizes disturbance to the watercourse. Likewise, if a future housing site is allowed by the WLCE, there should be an allowance for residential well construction in the WLCE. Funding sources may require more stringent restrictions depending on their public policy goals.

**H. Subdivision.**

COMMENTARY. Subdivision restrictions in conservation easements have been litigated. Concise drafting should minimize the prospect of litigation arising from later confusion about the extent of the restriction. Careful drafting is especially important where limited subdivision is allowed under certain circumstances. Relevant questions may be: When is subdivision permitted? What are the limitations? Is recombination an issue? Almost all WLCEs address subdivision, but few address recombination. Is it acceptable if the property is recombined to become part of a larger neighboring tract?

**Following are examples taken from different WLCEs specific to Subdivision.**

1. Not permitted.

Subdivision of the Property, whether by physical or legal process is prohibited.

2. Residential subdivision prohibited, except small area around residential dwelling:

Residential subdivisions are prohibited, except for one lot of no more than two (2) acres with the existing dwelling or additional permitted dwelling.

COMMENTARY. This example does not appear to prevent nonresidential subdivision. The language is too general for many applications and may result in litigation. While the provision may fulfill grantee's goal of limiting houses in the easement area, it would not necessarily achieve grantee's goal of limiting subdivision to avoid multiple owners or possible recombination into surrounding properties owned by third party owners. The grantee needs to consider its own goals when drafting rules about subdivision.

3. Permitted with permission, tied to building envelopes.

The Property may be subdivided into no more than \_\_\_\_ residential dwelling lots [corresponding with the number of Building Envelopes] with prior permission from the Grantee. However, under no circumstances shall any [Building Envelope] itself be subdivided. Non-residential subdivision of the Property is prohibited without the advance written permission of the Grantee. The Grantee shall not give such permission, unless the Grantor demonstrates to Grantee that the proposed subdivision will not otherwise substantially diminish or impair the agricultural productivity or water quality benefits of the Property. Farm Support Housing may not be sold or subdivided separately from the residential dwelling in the [Building Envelope] and parcel in which it is located.

COMMENTARY. Some jurisdictions may require that a house be constructed on a separate tax parcel, or there may be a need to create a residential parcel so the grantor can obtain a mortgage. When that is the case, an allowance may need to be made permitting a subdivision which would otherwise prevent the construction of a permitted dwelling. In this case, the grantee will need to address if the new, separate tax parcel can be transferred independently of the larger farm parcel.

4. Permitted under certain circumstances, without permission.

The Property may not be subdivided so as to allow more than one (1) principal dwelling lot. This restriction shall not preclude lot line adjustments that do not create additional building lots, and shall not preclude the creation of other parcels for farming and open space on which no residential building is allowed. Notwithstanding, the [building envelope], as shown on [Baseline documentation map] and attached hereto may not be subdivided.

## **I. Development.**

### **Following are examples taken from different WLCEs specific to Development.**

#### 1. Development rights conveyed to Grantee.

With the exception of buildings permitted in the Easement, Grantor conveys to Grantee all development rights that are now or hereafter allocated to, implied, reserved or inherent in the Property, and the parties agree that such rights are terminated and extinguished, and may not be used or transmitted to any portion of the Property, as it now or hereafter may be bounded or described, or to any other property.

COMMENTARY. In some situations, the definition of “development” may need to be clarified to avoid internal conflict. This example allows only construction of the permitted buildings, but a typical WLCE grantor typically has rights to build fences, ponds, roads, install utilities, and similar activities ancillary to the agricultural use of the property. Or, if the grantor is reserving the rights to participate in a land bank and sell credits, the drafter may want to be clear that this section is not intended to extinguish this right of grantor. This may be best handled by stating “Except as expressly permitted herein . . .”

#### 2. Commercial and industrial use prohibited.

Any commercial or industrial use of or activity in the Easement (other than silvicultural, agriculture and recreational uses or activities expressly permitted by the Easement) is prohibited.

## **J. Agricultural Chemicals.**

COMMENTARY. Certain funding sources resist limitations on grantor’s freedom to use pesticides and herbicides. Others encourage or require such limitations, such as requiring an Integrated Pest Management Plan; particularly where there are water courses in or near the easement area or the funding source’s primary objective is the protection of water quality and/or wildlife habitat. In some cases, it may be necessary to define agricultural chemicals so it is clear what is covered by this provision. For example, is compost, chicken manure, or other organic soil improvement covered? What about the somewhat controversial application of industrial or municipal sludge?

### **Following are examples taken from different WLCEs specific to Agricultural Chemicals.**

#### 1. Permitted in compliance with applicable law.

Grantor shall use agricultural chemicals only in accordance with the chemical label and according to local, state and federal law.

OR

The use of agrichemicals, including, but not limited to, fertilizers and biocides, in those amounts and with that frequency of application necessary to accomplish reasonable production and agricultural purposes, and in accordance with the instructions on the label, is permitted. Such use shall be carefully circumscribed near surface water and during periods of high ground water

2. Permitted with limitations.

There shall be no use of pesticides or biocides, including but not limited to insecticides, fungicides, rodenticides, and herbicides, except as approved by Grantee to control invasive species detrimental to the Conservation Values of the Property, and except as needed around improvements on the Property. Use of pesticides and biocides for forest management or agriculture and grazing must be included in an approved Management Plan or Harvest Plan. There shall be no aerial broadcast of any type of biocide on any part of the Property without prior written approval of the Grantee. Special care must be taken to prevent contamination of surface and ground waters and non-target species on and around the Property by biocides applied on the Property.

OR

The use of herbicides, insecticides, fungicides, fertilizers or other potentially harmful substances or the use or disposal of agricultural products and by-products on the Property must be controlled and limited so as not to have a material adverse effect on the waters or wildlife habitat associated with the Property, such as wildlife mortality or statistically significant measurable increases in the delivery of polluting nutrients to aquatic habitats. Any use of chemicals, substances or other similar agents on the Property must be in accordance with the Conservation Plan, government regulations and manufacturer requirements.

OR

There shall be no use of pesticides or biocides including, but not limited to, insecticides, fungicides, rodenticides, or herbicides, without the prior approval of the Grantee, unless such use is permitted by the Conservation Plan or the Forest Management/Stewardship Plan. Notwithstanding anything to the contrary contained herein, no pesticide or biocides may be used in the Stream Buffer Zone.

OR

Selective cutting and prescribed burning or clearing of vegetation and the application of pesticides or herbicides for fire containment and protection, disease control, restoration of hydrologic resources, wetlands enhancement and/or control of non-native plants is permitted only with the prior approval of the Grantee.

**K. Trash and Waste Disposal.**

**Following are examples taken from different WLCEs specific to Trash and Waste Disposal.**

The dumping, land filling, or accumulation of any kind of waste on the Property, other than farm related waste or equipment generated on the Property that does not substantially diminish or impair the

agricultural productivity and water quality benefits of the Property, is strictly prohibited. However, this shall not prevent the storage of agricultural products and byproducts on the Property, so long as it is done in accordance with sound agricultural practices, a current whole farm plan [conservation plan], and all applicable government laws and regulations.

OR

No refuse, trash, vehicle bodies or parts, rubbish, debris, junk, waste, radioactive or hazardous waste or other substance or material whatsoever, shall be placed, stored, dumped or permitted to remain on the Premises, except as required for the use of the Premises for normal agricultural activities.

COMMENTARY. It is common for older farms to have junk piles in and around barns or in the farmstead area containing all manner of things, from old equipment to agricultural chemicals. Many farms have petroleum products stored in aboveground or underground storage tanks. If this is the case, this provision would be violated immediately unless grantee required grantor to clean up the easement area. The grantee should have a good understanding about the extent and nature of the junk on the property and what types of regulated hazardous materials might be present, and whether there have been any spills. It is highly recommended that the grantee have a Phase 1 Environmental Site Assessment performed on all prospective easement properties prior to acquiring the conservation easement. The Phase I ESA needs to be conducted according to ASTM (American Society for Testing and Materials) standards by a qualified consultant and is the first step in environmental due diligence. The Phase 1 ESA will inform the grantee of the need to conduct physical testing. In some cases, the grantee may decide to exclude the affected area or decline accepting the easement if the property is contaminated. Any testing needs to be performed with the consent of the grantor because the grantor is likely to have a reporting obligation. There is not much law on the liability of easement holders for environmental contamination within the easement area caused by a party other than the easement holder. It is clear however, that the more the easement holder is doing things that can be construed as “operating” the property, the more likely the easement holder could be found liable.

OR

No trash, refuse, vehicle bodies or parts, rubbish, debris, junk, waste, radioactive or hazardous waste shall be placed, stored, dumped, buried or permitted to remain on the Property, except as reasonably required for the use of the Property for agricultural activities, and except as in accordance with applicable local, state and federal laws and regulations. Materials located in dump sites existing as of the date of this Easement, as indicated on Exhibit B, may remain. The storage of agricultural products, byproducts and agricultural equipment on the Property, so long as such storage is done in accordance with all applicable government laws and regulations, is permitted.

**L. Riparian Buffers.**

**Following are examples taken from different WLCEs specific to Riparian Buffers.**

1. Protection of riparian buffers.

Grantor agrees to maintain \_\_\_-foot riparian buffers on each side of \_\_\_\_\_ Creek and the unnamed tributaries on the Easement Area. The activities permitted on and use of the Riparian Buffers shall be governed by this paragraph. The Riparian Buffers shall consist of \_\_\_ foot buffers maintained permanently in grasses or naturally vegetated buffer areas.

(a) Buildings or other structures permitted by this Easement may not be located in the Riparian Buffers.

(b) Timber Harvesting permitted by the Easement may not be conducted in the Riparian Buffers.

(c) Any activity in the Riparian Buffers that results in soil degradation or erosion or is detrimental to the water quality of \_\_\_\_\_ Creek is prohibited.

(d) Grazing of livestock is not permitted within the riparian buffer or \_\_\_ feet of top of bank (whichever is greater) of \_\_\_\_\_ Creek and its tributaries.

(e) Agriculture, timber harvesting, horticultural and animal husbandry operations are prohibited in Riparian Buffers.

OR

Grantor and Grantee have designated a Stream Buffer Zone in the Easement Area, such Stream Buffer Zone being \_\_\_ feet from each bank of the streams as shown in the Baseline Documentation Report. Notwithstanding anything to the contrary contained herein, commercial forestry, agricultural, horticultural and animal husbandry operations, grazing, timber removal, cutting, logging, and mowing or other disturbances of native plants are prohibited within the Stream Buffer Area, except selective cutting or clearing of vegetation for fire protection, trails maintenance, and/or conservation management purposes. Conservation management purposes include, but are not limited to, prescribed burns or practices conducive to propagation and retention of native plants and wild population of game and non-game species and removal of non-native plants. Protection, maintenance and management activities shall only be allowed if undertaken in accordance with the Forest Management/Stewardship Plan. Hunting and fishing are permitted pursuant to applicable rules and regulations.

COMMENTARY. The location of the riparian buffer should be clearly defined to avoid later confusion about its boundaries. The best way to ensure that there is no confusion as to its locations is to show the buffer using metes and bounds on a recorded survey and mark it in the field. The WLCE would refer to the buffer as described in the survey. If the buffer is not shown on a recorded survey or on a map in the baseline documentation, then the method of measurement should be described, e.g. 100 feet from the top of the stream bank. Many funding sources will have specific buffer width requirements.

2. All activity prohibited.

Within the Stream Buffer Zone there shall be no activities, pollution or surface alteration of any kind that would be detrimental to water purity or that would alter natural water levels, drainage, sedimentation and/or flow in or over the Easement area or into any surface waters, or cause soil

degradation or erosion including, but not limited to, any sort of diking, dredging, alteration, draining, filling or removal of wetlands, agricultural practices or timber management.

3. Road and path construction in the stream buffer.

Notwithstanding anything to the contrary contained herein, construction of roads, trails, and paths in the Easement Area within the Stream Buffer Zone is prohibited, except for (1) the maintenance of those unpaved paths that exist as of the date of this Easement as described in the Baseline Documentation Report, and (2) construction and maintenance of primitive foot paths limited to single file pedestrian traffic. The unpaved paths may not be widened or covered with asphalt or other impervious materials. For the purposes of this Easement, gravel shall not be considered an impervious material. Construction of buildings, structures, and improvements (including, but not limited to, minor structures and fences) within the Stream Buffer Zone is prohibited.

COMMENTARY. For some farms, it will be important to create some allowances for limited stream crossings for access to fields or timber. The WLCE should require that these crossings are constructed in a manner reasonably calculated to minimize any adverse impact to the conservation values, and the grantor may consider requiring prior approval of the location and construction methods.

**M. Rural Enterprises**

COMMENTARY. This provision allows the grantor to conduct activities on the farm that are traditionally associated with farm use but that may not be permitted by the reserved right to conduct agricultural activities. The WLCE needs to reserve for the grantor the flexibility for the farm to be economically viable while protecting the conservation values. Typically WLCEs will limit the types of permitted rural enterprises and their locations on the farm. Those rural enterprises that have more potential to compromise the conservation purposes often require the advance permission of the grantee.

**Following are examples taken from different WLCEs specific to Rural Enterprises.**

1. Permitted within building envelope without permission; permitted outside building envelope with prior permission.

Grantor retains the right to use the Agricultural Building Envelopes for otherwise lawful and customary rural enterprises, such as, but not limited to, a winery, bed and breakfast, saw mills, farm machinery repair enterprises. Conducting customary rural commercial enterprises on any other part of the Easement Area is not permitted without the advance written permission of Grantee in each instance. Grantee shall not give such permission unless Grantee determines that the proposed use will not diminish or impair the conservation values of the Easement Area or violate the farm Conservation Plan.

OR

The existing buildings and improvements used for Rural Enterprises may be removed, repaired, and replaced without further permission of the Grantee. Existing rural enterprise buildings and



improvements, inside the Building Envelope, may be enlarged with prior written notice to Grantee per notice and permission section in easement. Existing rural enterprise buildings and improvements outside the Building Envelope may be enlarged with the advance written permission of the Grantee [per notice and permission section in easement]. New buildings and improvements necessary for Rural Enterprises outside the [Building Envelope] may only be constructed with the advance written permission of the Grantee [per notice and permission section in easement].

OR

Grantors retain the right to use the Property for otherwise lawful and customary rural enterprises, such as, but not limited to, farm machinery repair, sawmills, firewood distribution, or educational programs so long as such uses are confined to locations within the “Farmstead Area” as identified on Exhibit B. Conducting customary rural enterprises on any other part of the Property is not permitted without the advance written permission of the Grantee in each instance. The Grantee shall not give such permission unless the Grantee determines that the proposed use will not substantially diminish or impair the conservation values of the Property.

2. Grantee’s prior consent required.

Grantor reserves the right to conduct any gainful home occupation or profession in the residences in the Building Envelope, provided any such activity is confined within the residence and is conducted primarily by persons who reside in the dwelling. Further, Grantor reserves the right to engage in accessory uses of the Protected Property, provided such uses are related to the principal agricultural, forestry, and open space uses of the Protected Property, and are subordinate and customarily incidental to those principal uses. Grantor shall not engage in any such home occupation or accessory use of the Protected Property without first securing the prior written permission of Grantee, which permission may be withheld if Grantee determines, in their sole discretion, that the occupation, profession or accessory use would be inconsistent with the Purposes of the Grant as stated in [the easement’s Purpose Clause].

**N. Alternative Energy Facilities: Solar Panels, Wind Turbines, and Hydroelectric Power.**

COMMENTARY. Unless specifically allowed, the general prohibitions in most WLCEs would reasonably be interpreted to prohibit alternative “clean” energy facilities. Some of North Carolina’s lands with high conservation value are also desirable for the installation of alternative energy facilities. The grantee will need to consider its policy goals in deciding whether to permit the installation of alternative energy facilities in an easement area. The overarching question needs to be whether the facilities will degrade the conservation purposes of the WLCE. Considerations are the solar, wind, or hydroelectric energy facility’s location, size and scale, generation capacity, whether the power generated can be transmitted off the property for the use of others, the construction period and process, the operation, maintenance and replacement of the facilities, necessary access roads, ancillary buildings, and the utility lines that support the transmission system. If the grantee decides to allow such facilities, the WLCE should be flexible enough to accommodate unforeseen advances in technology while protecting the conservation values. The allowance of energy production facilities will often mean that a third party will have an easement over a portion of the conservation easement area in order to operate the energy system. The WLCE needs to

anticipate and circumscribe the relationship between the grantor, grantee, and third party energy producer as well as consider the monitoring implications of said arrangement. The grantee should require that it approve any such easement to ensure that its terms will not contradict the conservation purposes of the WLCE. There are also best management practices for the installation and operation of alternative energy facilities that should be thoroughly reviewed and where appropriate, required as a component of the third party easement and/or contract.

**Following are examples taken from different WLCEs specific to Alternative Energy Facilities:**

1. Wind, solar, and geothermal facilities permitted; hydroelectricity permitted only with prior approval.

Grantor retains the right to construct geothermal, wind, and solar generation facilities for noncommercial uses solely on the Property, except that any incidental surplus electricity may be sold commercially or credited to Grantor's utility service (net metering). Because of the potential impact on riparian areas and other protected Conservation Values, Owner may only generate hydroelectricity for use on the Property with the prior approval of Grantee as provided herein.

2. Wind, solar, and hydropower structures permitted with prior approval.

Installation of wind, hydropower, and solar energy structures shall be permitted with prior Grantee approval as provided herein and Grantee shall take into consideration the impact on the 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 Grantee to protect the Conservation Values in perpetuity. Grantor and Grantee hereby agree this paragraph is a reasonable restriction under state and federal law.

3. Limited number of wind turbines permitted only with prior approval.

The construction, use, maintenance, repair and replacement of \_\_\_\_ turbine(s) for the generation of wind energy shall be permitted exclusively, but only upon receipt of the Grantee's prior written approval (to be granted, conditioned, withheld in its sole discretion). When considering whether to issue such approval, Grantee shall weigh and evaluate, among other relevant factors, the overall aesthetic impacts of the proposed turbine(s) in the context of the surrounding landscape, the environmental impacts, and the scope of its anticipated energy benefits, and, upon Grantee's request, Grantor shall be required to provide Grantee with written documentation addressing these and other matters deemed relevant by Grantee.

4. Wind, solar, and hydropower facilities permitted, but limited by function, number of facilities, and location.

To the extent permitted by, and in accordance with, all then-applicable laws, regulations, and requirements, Grantor may place or construct facilities for development and utilization of wind, solar, and hydropower energy resources for residential use principally on the Property; provided, however, that there shall be no more than \_\_\_\_\_ structures that may be located within the "Energy Zone" depicted on Exhibit \_\_\_\_.

5. Current wind and solar technology prohibited, future commercial energy production possible with approval.

As of the date of this Easement, Grantor and Grantee 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 as determined by Grantee, Grantor may seek Grantee's written approval of an alternative energy production plan in accordance with section \_\_\_\_ [which should mandate prior written approval by Grantee].

6. Wind and solar energy prohibited generally, but allowed for certain primary use in furtherance of conservation purpose.

The construction of wind and solar energy generation facilities are prohibited, except when their primary use is necessary for conducting common grazing practices on the Property, such as providing energy necessary for feeding, watering, and care of livestock, and the Grantee provides Grantor, in advance and in writing, approval subject to terms and conditions Grantee determines to ensure the protection of these conservation values.

7. Utility systems and facilities allowed. Solar panels and wind turbines prohibited.

Utility systems and facilities may be installed, maintained, repaired, extended and replaced only to serve uses and activities specifically permitted by this Easement [and the adjacent residential development]. This does not include communications towers, satellite dishes and antennae, wind turbines, solar panels, or similar structures without the prior approval of Grantee.

**O. Ecosystem Services.**

COMMENTARY. Ecosystem Services is a term that refers to the collective benefits humans derive from a multitude of resources and processes that are supplied by natural [ecosystems](#), including clean drinking water and clean air. There are growing markets to sell those services to those landowners "producing" them or to offset impacts to legally protected ecosystem services (such as wetlands). Current and developing markets include wetland mitigation, nutrient offsets related to development or carbon credit trading. Mitigation requirements are an increasingly popular tool for offsetting ecological impacts inherent in development or other activity. Mitigation is the restoration, creation, enhancement or preservation of regulated natural resources on one property in order to offset negative environmental impacts on another property. Mitigation bank programs authorize the bank owner to sell "credits" to those required to offset the ecological impact of their activities. These values of land for this offset are broadly referred to as "ecosystem services." Increasingly, grantors will want to reserve the right to sell credits from the WLCE property in order to maximize the economic viability under easement. Where the grantee decides to allow this reservation by the grantor, the WLCE should incorporate flexibility that accommodates the creation of new mitigation programs. Certain funding sources require the WLCE to prohibit the sale of credits because such a reservation by the grantor is thought to conflict with the

public policy behind the funding program. There may be instances when the grantee decides to prohibit grantor from reserving the right to use the property to obtain denser development elsewhere (transfer of development rights programs) while allowing grantor to reserve the right to sell credits under various ecosystem services programs. Both grantee and grantor should be particularly wary about any reservation of the right to use the property encumbered by the WLCE to obtain the right to develop another property more densely than would be permitted without the WLCE; such transactions may disqualify grantor from receiving state and federal tax benefits.

**Following are examples taken from different WLCEs specific to Ecosystem Services.**

1. Permitted with approval.

Grantor may develop ecosystem functions on the Property, consistent with the provisions governing land use set forth in this Easement, including, but not limited to, carbon sinks, stream bank restoration, biodiversity mitigation, carbon sequestration and wetland and stream mitigation, 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 is obtained from Grantee. Grantee is not responsible for monitoring any such activities for compliance with permit(s) therefore, and Grantee has no obligation to enforce the permits.

2. Sale or exchange of ecosystem services credits permitted.

Grantor reserves the right to enter into agreements whereby (1) the Grantor 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, Grantor reserves the right to sell, trade, or exchange quantifiable ecosystem services credits associated with the Property, provided that such sales, trades, or exchanges are 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 Grantor shall at all times remain responsible for compliance with this Easement. [One example of such agreement, sale, trade, or exchange is one under which Grantor 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 on the Property and further provided that Grantor may not benefit from any compensation or credits available through such programs or agreements in the event that such restoration is required as a result of Grantor's violation of this Easement.] Grantor and Grantee acknowledge that, because the conservation interests protected by this Easement shall not be adversely affected by any agreements, exchanges or trades, and the only interest affected shall be Grantor's interest, any compensation received by Grantor for such agreements, exchanges or trades shall be payable in its entirety to Grantor. Grantor and Grantee 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. Note this second example clarifies that the economic benefit from the sale of the credits will belong only to the grantor.

3. Grantor permitted to engage in current or future incentive programs with consent from Grantee.

Subject to Grantee's prior written consent, not to be unreasonably withheld, conditioned or delayed, the right to participate in, and retain any income received there from, 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.

## VIII LEGAL CONCEPTS

This Article provides sample language for certain important legal matters arising with WLCEs. This is not an exhaustive list of all the legal issues posed by a WLCE, but a list of some of the more important issues with a particular focus on provisions required under the federal tax law for deductible WLCE donations.

### A. Notice to Grantee

Grantor shall notify Grantee before undertaking any use or change in use of the Easement Area which may have an adverse impact on the Conservation Purposes of the Easement Area. Uses described in the Baseline Documentation Report, and in any conservation, best management practices and/or forestry plans delivered to Grantee pursuant to the terms of this Agricultural Easement, shall constitute proper notice for purposes of the foregoing sentence. The purpose of this notice requirement is to comply with the provisions of Treas. Reg. § 1.170A-14(g)(5)(ii), in order to allow Grantee a reasonable period to consider the prospective impact to the extent Grantee deems appropriate.

## OR

**Notices.** All notices, requests or other communications permitted or required by this Conservation Easement shall be sent by registered or certified mail, return receipt requested, addressed to the parties as set forth above, or to such other addresses such party may establish in writing to the other. All such items shall be deemed given or made three (3) days after being placed in the United States mail as herein provided. In any case where the terms of this Conservation Easement require the consent of any party, such consent shall be requested by written notice. Such consent shall be deemed denied unless, within ninety (90) days after receipt of notice, a written notice of approval and the reason therefore has been mailed to the party requesting consent.

COMMENTARY. This paragraph addresses the federal requirement that the grantor must notify the grantee in writing prior to exercising any right reserved in the WLCE which could adversely affect the conservation values.. Note that this language standing alone does not require that the grantor obtain approval from the grantee in order to proceed. If the grantee determines that the grantor will have to get prior approval before undertaking certain actions like building a barn or constructing a pond, then there will need to be additional language addressing that approval, typically included in the section addressing the specific activity. The WLCE should contain a provision describing how notices are to be given to the parties.

**B. Entry by Grantee.**

Grantee shall have the right to enter the Easement Area for the purpose of inspecting for compliance with the terms of this Agricultural Easement. Grantee shall provide Grantor fifteen (15) days written notice prior to entering the Easement Area; provided, however, Grantee shall not be required to notify Grantor prior to entering the Easement Area in the event that Grantee reasonably believes that there are activities ongoing or threatened which would significantly impair the Conservation Values.

COMMENTARY. This paragraph balances grantee's right to enter the property as required under federal and state law with the privacy of the grantor. However, it allows the grantee to enter without prior notice to address an emergency situation. This language is often found in the enforcement section of the WLCE, and is closely related to the grantee's ability to obtain an injunction from a court to stop a particular action in violation of the easement, like the unauthorized construction of a house or cutting of timber.

**C. Subordination of Mortgage.**

Nothing in this Easement shall be construed as impairing the ability of Grantor to use the Property as collateral for subsequent borrowing, provided that any mortgage or lien arising from such borrowing shall be subordinate to this Easement.

COMMENTARY. The WLCE must be a perpetual land restriction to qualify for federal and state tax benefits. This requires that all liens be subordinate to the WLCE so that any foreclosure of such lien will not extinguish the WLCE (the foreclosure of a superior lien extinguishes junior liens). Many WLCEs do not have a separate provision addressing this issue like the foregoing example, but all WLCEs need a title warranty where the grantor states that there are no prior liens, and that the grantor will defend the title conveyed to grantee. If there is a lien on the property that will not be paid off and canceled at the closing of the WLCE transaction, then the lien will have to be subordinated. The grantee should address this issue in the beginnings of any dialogue with the grantor. Lenders often have rigorous and lengthy procedures for approving subordinations and are likely to require an appraisal, a copy of the easement and other information.

**D. Limitations on Transfer of Grantee's Interest.**

[Subject to the contingent rights of the funding source, with timely written notice and approval of the funding source,] Grantee shall have the right to transfer this Agricultural Easement to any public agency or private nonprofit organization that, at the time of transfer, is a qualified organization under 26 U.S.C. §170(h) of the Internal Revenue Code, as amended, and under N.C.G.S. § 121-34 *et. seq.*, provided the agency or organization expressly agrees to assume the responsibility imposed on Grantee by this Agricultural Easement. As a condition of such transfer, Grantee shall require that the Conservation Purposes intended to be advanced hereunder shall continue to be carried out. If Grantee ever ceases to exist or no longer qualifies under 26 U.S.C. §170(h) of the Internal Revenue Code, or applicable state law, a court with jurisdiction shall transfer this Agricultural Easement to another qualified organization having similar purposes that agrees to assume the responsibility imposed by this

Agricultural Easement. In no event shall Grantee have the right to transfer its interest in this Agricultural Easement except in accordance with this paragraph.

COMMENTARY. This paragraph is intended to satisfy the legal requirements that the grantee and its successors are qualified to hold the WLCE under the state and federal laws.

#### **E. Termination of Easement and Division of Proceeds.**

The conveyance of this Agricultural Easement from Grantor to Grantee gives rise to a property right immediately vested in Grantee. If a court with proper jurisdiction determines that conditions on or surrounding the Property change so much that it becomes impossible to fulfill the conservation purposes of this Easement, the court may, at the joint request of both the Grantor and the Grantee, terminate the Easement created by this Deed.

If condemnation of a part of the Property or of the entire Property by public authority renders it impossible to fulfill any of these conservation purposes, as determined by the Grantee, in the exercise of its sole discretion, this Easement may be terminated through condemnation proceedings. If the Easement is terminated and the Property is sold or taken for public use, then, as required by §1.170A-14(g)(6) of the IRS regulations, the Grantee shall be entitled to \_\_\_% percent of the gross sale proceeds or condemnation award which is the ratio of the appraised value of this Easement to the unrestricted fair market value of the Easement Area, as these values are determined on the date of this Deed. The Grantee shall use the proceeds consistently with the conservation purposes of this Deed.

COMMENTARY. In accordance with the federal tax law, this section makes clear that the grantee has a real property interest, and that upon any termination of the easement followed by a sale or in the event of a condemnation, grantee will be paid for the value of its interest. The mechanism used to value grantee's interest is required by the federal law. Certain funding sources may require that the grantee split its share of the proceeds with the funding source.

#### **F. Environmental Warranty.**

Grantor represents and warrants that it has no actual knowledge of a release or threatened release of hazardous substances or wastes on the Property or in the Easement Area that violates any Environmental Law (as hereinafter defined) and there is no environmental condition existing in the Easement Area or on the Property that may prohibit or impede use of the Easement Area for the Conservation Purposes. As used herein, "Environmental Law" means any applicable current or future federal, state, or local governmental law, regulation or ruling applicable to environmental conditions on, under or about the Easement Area, including, without limitation, federal, state or local solid waste disposal rules, the Comprehensive Environmental Response, Compensation and Liability Act of 1980, as amended, the Hazardous Materials Transportation Act, as amended, the Resource Conservation and Recovery Act, as amended, the Toxic Substances Control Act, as amended, the Water Pollution Control Act, as amended, the Clean Air Act, as amended, Superfund Amendments and Reauthorization Act, as amended, or any other applicable federal, state or local laws, regulations or ordinances.

OR

Grantor has used on and/or applied to the Easement Area feeds, supplements, fertilizers, equipment lubricants and other substances in ordinary and routine farming applications and in accordance with their prescribed instructions for application or use. With the foregoing exception, Grantor warrants, represents and covenants to the Grantee that to the best of its knowledge after appropriate inquiry and investigation that (a) the Easement Area described herein is and at all times hereafter, while owned by Grantor, will continue to be in full compliance with all federal, state and local environmental laws and regulations, and (b) as of the date hereof there are no hazardous materials, substances, wastes or environmentally regulated substances located on, in or under the Easement Area or used in connection therewith, except as stated above. Grantor hereby promises to defend and indemnify Grantee against all litigation, claims, demands, penalties and damages, including reasonable attorney's fees, arising from or connected with any release of hazardous waste by the Grantor or any violation of federal, state or local environmental laws and regulations by Grantor.

COMMENTARY. There are several differences between these two examples. The first example does not recognize the prior farm use, and the second does. The first example only requires the grantor to make the representation based on actual knowledge, whereas the second requires the representation to be based on inquiry. The second example specifically requires future use of the property to be in compliance with all environmental laws. Sometimes this is covered generally in another provision requiring all action by grantor to be in accordance with law. Finally, the second contains an indemnification of the grantee specific to environmental matters. Please also see the discussion above at VI.K. regarding environmental issues and Phase I Environmental Site Assessments.

#### **G. Indemnification.**

Grantor agrees to indemnify and hold Grantee harmless from any and all costs, claims or liability, including but not limited to, reasonable attorneys' fees, arising from (i) any personal injury, accidents, negligence, or damage relating to, in or on the Easement Area, or any claim thereof; (ii) any violation of any federal, state or local environmental or land use law or regulation or the use of or presence of hazardous substances, waste or other regulated materials in, on or under the Easement Area; and (iii) Grantee's exercise of its rights of entry pursuant to this Agricultural Easement; provided, however that if such costs, claims or liability are due in whole or in part to the negligence of Grantee or its agents, contractors or employees, liability shall be apportioned accordingly.

COMMENTARY. This provision requires grantor to indemnify (meaning to be responsible for making another party whole) and hold grantee harmless for damages suffered by grantee in certain events. A grantee should not make decisions to undertake unwarranted risks based on an indemnity provision. An indemnity is only as good as the indemnitor's pocket is deep, and it is not a substitute for good due diligence, good decision making, and a good WLCE. The grantee should include a specific environmental indemnity, whether in an indemnity paragraph or a separate environmental section.

#### **H. Transfer Fee.**

COMMENTARY. A transfer fee is a relatively new concept in the conservation community. The transfer fee offers the grantee an opportunity to provide additional funding to its stewardship program. In the event a grantor cannot provide stewardship



funds at the time the easement is completed, this can be suggested as an alternative option that allows stewardship funds to be collected at a future time. The parties may choose to be more specific in describing conveyances exempt from the transfer fee. For example, the grantor may want the right to convey the property to a trustee of a family trust. Successor grantors will likely try to escape its application using ostensibly exempt conveyances such as purchasing the shares of a corporate grantor, rather than purchasing the property in a conveyance from the corporation. This provision is also likely to elicit resistance from a prospective grantor who views it as possibly chilling future sales of the land.

Upon each conveyance of an interest in the Property to a third-party purchaser, the transferor of the Property shall pay to Grantee a transfer fee equal to one percent of the contract sales price or other consideration given for the transfer of the Property. The transferor of the Property shall pay the transfer fee to the Grantee at the time of the transfer and the Grantee shall use the transfer fee for the purpose of acquiring, monitoring, and enforcing agricultural conservation easements in [\_\_\_\_ County, North Carolina]. The transfer fee shall not be due upon the transfer of the Property by inheritance or the transfer to an entity or trustee controlled by the Grantors or their heirs.

#### **I. Right of First Refusal.**

In case of any contemplated sale of the Property or any portion thereof by the Grantor or any successor in title thereto, first refusal as to any bona fide offer of purchase must be given to the Grantee, its successor or assigns. If Grantee so decides to purchase, it shall notify the then owner of its willingness to buy upon the same terms within thirty (30) days of receipt of written notice of such bona fide offer. Failure of Grantee to notify the then owner of its intention to exercise this right of first refusal within such thirty (30) day period shall free the owner to sell pursuant to the bona fide offer. Provided, however, that if there are any outstanding deeds of trust or other encumbrances against the property, any right to repurchase shall be subject to said deeds of trust or encumbrances, and they shall either be satisfied or assumed as part of the purchase price. This right of first refusal in favor of Grantee shall be a perpetual right of the Grantee to the maximum extent permitted by law, and shall survive any transfer of the Property or relevant portion thereof where the grantee is not notified in accordance with this provision or where Grantee declines to purchase the Property such portion thereof.

COMMENTARY. It is likely that any right of first refusal for a period of longer than 30 years would be unenforceable because of limitation in the North Carolina General Statutes.

#### **J. Integration Clause.**

COMMENTARY. This is a legal statement that the entire agreement of the parties is found in the agreement document, and that there are no outside agreements or other agreements. This is helpful to have when litigating the meaning of an agreement so that both parties are not raising issues beyond the scope of the agreement in the document.

This instrument sets forth the entire agreement of the parties with respect to the Conservation Easement and supersedes all prior discussions, negotiations, understandings or agreements relating to the Conservation Easement, all of which are merged herein.

**K. Severability Clause.**

COMMENTARY. This is a legal statement that the parties agree that a court's finding of one provision invalid or unenforceable will not make the entire agreement void.

Invalidity of any of the covenants, terms or conditions of this Conservation Easement, or any part thereof, by court order or judgment shall in no way affect the validity of any of the other provisions hereof which shall remain in full force and effect.

**IX. CONCLUSION**

As North Carolina continues to experience rapid conversion of working lands to other land uses, the preservation of farmland and forest lands will remain an important strategy in conserving the state's economy, culture and environment. The Working Lands Conservation Easement Guidance Document was created to provide assistance on the negotiation and preparation of key portions of Working Lands Conservation Easement documents. Members of the WLS spent numerous hours discussing, drafting and reviewing the content of the guidance document to ensure the information provided was appropriate to the task and specific to the needs of the SWCDs and land trusts.

Please remember that the materials produced and distributed by the Working Lands Subcommittee of the Community Conservation Committee of the North Carolina Association of Soil and Water Conservation Districts are intended to serve only as general guidance for and examples of working lands conservation easements. These materials, including this document and all attached documents, should not be used in lieu of professional legal advice. The Working Lands Subcommittee recommends that all legal documents be reviewed by an attorney licensed to practice in the state of North Carolina.