



A FORESTER'S GUIDE TO CONSERVATION EASEMENTS

With particular attention to the practice of forest management on easements held by the Society for the Protection of New Hampshire Forests

GEORGE F. FRAME, CF
EASEMENT STEWARD

SOCIETY FOR THE
PROTECTION OF
NEW HAMPSHIRE
FORESTS



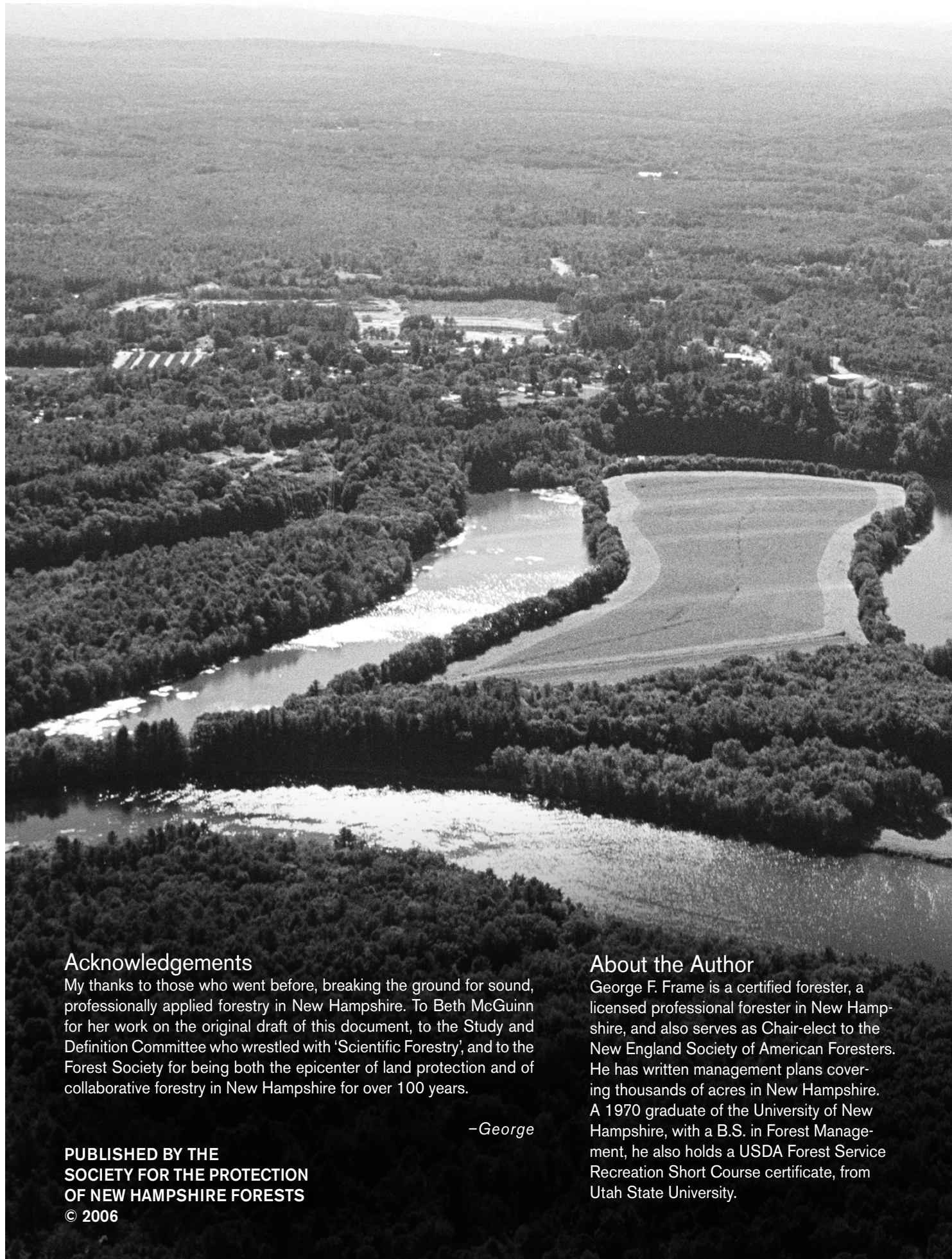


⁴Forester's Guide

TO CONSERVATION EASE-

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—George

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Introduction



Times are certainly changing. A practicing forester in New Hampshire can no longer assume that the land he or she is managing will be in the same configuration, under the same ownership, or even available to forest management activities the next time the plan says something should happen. The price of land is escalating and newer landowners may have more monetary than conservation interests in the land. The 2005 update of the Forest Societys' document New Hampshire's Changing Landscape highlighted the following:

- New Hampshire is losing about 17,500 acres of forestland every year.
- For four straight decades, New Hampshire has been the fastest growing state in New England and the nine-state Northeast region.
- Substantial land conversion is now occurring along and between all of the state's major transportation corridors including Interstates 93 and 95, NH Routes 101 and 16, and beginning to extend along Interstate 89.
- Land prices have risen 61% statewide since 1998, with the greatest increases occurring in the fastest developing regions.

This means the land base is shrinking, and the opportunity for a New Hampshire forester to practice good forestry is becoming more difficult and is happening on smaller and much more expensive lots.

What can be done to slow the rate of loss? How can foresters protect their active management land base? One good answer is through the use of conservation easements (CE). This useful conservation tool allows for and, in deed, promotes good forest management.

Landowners place conservation easements on their land to ensure that it remains intact and productive in perpetuity. Many easements use forest management as one of the tools to guarantee this outcome.

Therefore, foresters need to know and understand conservation easements. Perhaps it would help if you didn't think of them as incomprehensible documents written in modern-day legalese. Instead, think of them as a way of protecting your job. The latest generation of easements now requires written management plans and forester control of timber sales. Can you write more management plans every year? Do you need a few more timber sales? This kind of thinking will hopefully promote a more thorough study of the subject.

What specifically are conservation easements? What restrictions do they contain? How are those restrictions enforced? Are there any limitations on your normal management activities? Do you have to be a lawyer to understand them? Will it increase your cost of doing business if the land you are working on is protected? Are conservation easements just another type of "keep-out" sign?

It is our hope that this document will adequately answer those questions and provide you with a basic understanding of the terminology and purposes of easements. It is also hoped that you will use this new knowledge to promote easements to landowners facing the significant development pressures so prevalent these days. It will be good for the landowner, good for you and your business, and best of all, good for the land.

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TO CONSERVATION EASE-

PART 1: THE BASICS

What is a Conservation Easement?

A conservation easement is a legal agreement between a property owner and a conservation organization that restricts how the property may be used. It is a publicly recorded deed that transfers ownership/control of a specific set of rights from the owner of the land to an organization who will then be the steward of those specified rights forever. All Forest Society-held easements are written 'in perpetuity'—that is, they affect the property forever, even after the property is transferred to new owners. In each easement, the landowners (the grantors) agree, for themselves and all future property owners, to uphold the terms of the conservation easement. The conservation organization receiving the rights (the grantee) agrees to monitor and ensure compliance with the provisions of the easement deed.

Most easement deeds, including those held by the Forest Society, contain three primary parts. The first defines the purposes of the easement – a section referred to repeatedly throughout the deed, and this guide. The second spells out the use limitations on the property. Use limitations or restrictions specify how the purposes outlined in the first section will be accomplished. This guide will focus on the use limitations that affect forest management activities on easement properties but will also lightly cover the others normally found in a present-day easement.

The third section of the easement describes the rights, if any, reserved by the landowner. Not all easements contain reserved rights. They are necessarily unique to the specific property and so, cannot be fully addressed in this guide. An attempt will be made however, to look at the most common reserved rights contained in easements written by the Forest Society.

The balance of the easement deed contains sections detailing the mechanics of taxes, notification of property transfer, resolution of potential problems and other similar issues that may or may not be related to forestry. The deed also contains a description of the property affected by the easement, which may or



may not include the entire property. Knowing where the easement boundaries are can have significant impacts on your forest management.

For your reference a generic Forest Society conservation easement written to current (2005) standards is included in this guide as Appendix A.

Do easements Allow Forest Management?

Conservation easements generally prohibit all commercial and industrial activities on the easement property. In most cases, agricultural and forestry activities are not included in the definitions of commercial or industrial activities. However, there are conservation organizations that define forestry as a commercial activity and consequently prohibit it from the easement property.

The Forest Society has supported responsible forest management since being founded in 1901. Therefore, almost all of our conservation easements allow forest management, with some limitations. We will take a closer look at these limitations in a following section of this guide. For the most part, the limitations are intended to encourage a long term, conservative approach to forest management to extend management opportunities well into the future.

What's the Deal with Access?

There are some misunderstandings about access and easements circulating in the world. So here is the pitch: Landowners can put up gates to prohibit wheeled motorized vehicles, ATVs, horses, or anything else that they want kept out. Roads can be totally blocked to traffic and fully restored to a more natural condition, prohibiting all access except foot travel. Or, they can be upgraded to reduce vehicular impacts and then left open to the general public, if that type of facility is allowed by the deed. There are many alternatives for access and most are at the discretion of the landowner.

There are a few cases where the landowner may be limited in what access he can prohibit. If the landowner received public funding for the easement, it may contain a clause entitled "Affirmative Obligation for Public Access." This clause requires that the landowner provide guaranteed access to the general public for pedestrian recreational activities. This includes hunting, fishing, hiking, bird-watching, cross-county skiing, snow-shoeing, and similar non-commercial, non-motorized recreational pursuits. It does not include camping.

Are all Easements the Same?

A conservation easement is the result of a process of negotiations between the eventual grantor and grantee. Every grantor is different. Landowners have different goals and expectations, different wants and desires. Likewise, every parcel of land has different ground cover, different slope, elevations, soils, opportunities and history; so it follows that each easement would be different. Many are similar but few are exactly the same.

Up until 1997, the Forest Society used what is referred to in this guide as a Type 1 easement for the starting point of negotiations. As you will see, the Type 1 easement had some weak points when it came to forest management. The Forest Society replaced it with the Type 2 easement language that strengthened the role of professional foresters. It is now the new standard. Most Forest Society-held

easements closely follow one of these two types depending on the date of the easement.

What are your Responsibilities as an Agent of an Easement Property Owner?

Every project you propose on an easement-protected property needs to be in compliance with the terms of the easement deed. If not, you may create a situation where your client, the landowner, will be in violation. If you are directed to perform a task that you know is in violation of the terms of the easement, you should notify the landowner. If necessary, contact the Forest Society's easement stewardship staff for more information, for an interpretation of the easement terms, or to discuss how to maintain compliance with the easement.

How can the Forest Society Assist you with Compliance on an Easement Property?

The Forest Society's easement stewardship staff is available to answer your questions about forest management on easement properties at any time. We can provide copies of the easement deed and the approximate easement boundaries either sketched on a topographic map or overlaid on an orthophoto background. If the Forest Society holds the easement, one of their stewardship staff members can meet with you and your client to walk the site and discuss the proposed activities in light of the easement terms.

For easements that follow the Type 2 language, we will provide the management plan certification form for your use (a reproducible copy of the form is included with this document as Appendix C.) When the language in the easement deed varies from the examples given in this guide, our easement stewardship staff can also help you interpret the terms in your client's version.

How are Use Limitations



All Forest Society held easements are written "in perpetuity"—that is, they affect the property forever, even after the property is transferred to new owners.



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PART 2: USE LIMITATIONS

Enforced?

The grantee of the easement is responsible for enforcing all the terms and limitations included in it. The Forest Society maintains a cadre of easement stewards who monitor the easement properties from the air and on the ground. Each easement must be monitored annually. Following a report of a possible problem, one or more stewards may visit the property and complete a thorough analysis of the ground situation. If there is a potential violation of the easement terms, we will contact the landowner to discuss and resolve the situation. Resolution alternatives usually range from a quick change of plans to a cease-and-desist order issued by a judge with the possibility of further court action.

There is an entire section of the conservation easement deed dedicated to, and usually entitled, Use Limitations, which is simply another way of saying restrictions. As discussed earlier, use limitations are put in place to protect the conservation values of the land. The value of the easement and therefore the residual value of the easement property are, at least partially, determined by the number and intensity of the restrictions.

Some use limitations are absolute. For example, you will normally see 'The Property shall not be subdivided.' There is little doubt that it would be a difficult thing to try to subdivide a piece off this easement tract once everyone was aware of the limitation.

However, there are other limitations that require more interpretation. For example, there is a use limitation that reads:

'No removal, filling, or other disturbances of soil surface, nor any changes in topography, surface or sub-surface water systems, wetlands, or natural habitat shall be allowed unless such activities:

i. are commonly necessary in the accomplishment of the agricultural, forestry, conservation, habitat management, or noncommercial outdoor recreational uses of the Property; and,

ii. do not harm state or federally recognized rare, threatened, or endangered species, or exemplary natural communities, such determination of harm to be based upon information from the New Hampshire natural Heritage Bureau or the agency then recognized by the State of New Hampshire as having responsibility for identification and/or conservation of such species; and,

iii. are not detrimental to the Purposes of this Easement.'

Is this a use limitation that will affect what you

can do for your client on easement land? The underlining used above is to draw your attention to two areas where you may come away with more questions than answers after reading this particular clause. What is commonly necessary in the accomplishment of the listed uses of the property? Who decides whether an action is detrimental to the Purposes? What you can or cannot do is not as clear anymore. In these cases, interpretation and application now require more of your professional judgment, experience, and knowledge of conservation values.

How do you Identify the Limitations that may Effect the Property you Manage?

Certainly the first thing you need is a copy of the conservation easement deed to be able to identify applicable limitations. You can see by the clause written above that this is not something you want paraphrased for you. You will need the real thing in front of you. You should be able to get a copy of the deed from the landowner but if not, you can get one at the County Registry of Deeds (see www.nhdeeds.com) or from the Forest Society.

Your main concerns will be locating, reading, and then understanding the sections of the deed entitled Purposes and Use Limitations. There are two caveats to this statement, however.

The first concerns the important sections of the deed to read. There may be constraints on the use of the property contained in the general clauses of the document. You may also be surprised by what the landowner has put in the Reserved Rights section so, please, don't limit your reading to the two listed sections.

And secondly, be aware that the easement deed may not cover the entire property that you are managing. Check the property description or any available

One important thing to remember about conservation easements is that if an activity is not specifically restricted or prohibited, it is allowed.

TYPE 1 EASEMENTS

Introduction

Through 1996, Forest Society-held easements contained simple but broad forestry language intended to be flexible enough to accommodate any future scientific developments in forest management. This is referred to as Type 1 language.

Before we can fully discuss use limitations, there is a situation with Type 1 easements that needs clarification. Specifically, a Type 1 easement calls for “scientifically based” forest management that will uphold the purposes of the conservation easement, maintain the scenic quality of the property, and maintain the productive capacity of the property—all under the guidance of a coordinated

forest management plan for the sites and soils of the property.

With an increasing level of activity on land protected by Type 1 easements, stewards and landowners needed more guidance into just what scientifically-based Forest Management really meant. So, in 2001 the Forest Society formed a small committee with representatives from University of New Hampshire Cooperative Extension, the U.S. Department of Agriculture Forest Service, and the University of New Hampshire Forestry faculty to define “scientifically based” forest practices within the context of the Forest Society’s conservation easements.

Since the definition was finalized, Forest Society easement stewards use it to guide their monitoring of forest management activities on Type 1-easement protected lands. This document uses that same definition to provide guidance for foresters managing land protected by Type 1 easements. The definition is presented at the end of the Type 1 discussion.

The format of the following sections has been altered for ease of presentation and, hopefully, to increase the usefulness of the information.

maps to see where your planned activity will occur and if that location is within the easement area. Often, a survey of the easement area is recorded with



the deed. If this is available it is the best opportunity for you to locate the affected ground. Sometimes there is no recorded survey and you may need to translate the property description attached to the deed. The landowner may be aware of the boundary between eased property and unconstrained lands but that doesn’t mean, of course, that the boundary is marked on the ground.

Next, determine from your reading if you are dealing with a Type 1 or Type 2 deed. There is considerable difference between the two types and there are also some less uniform editions of the deed out there. All easement deeds written before 1987 are unique in that they were each written for a specific property. If it is too confusing, call the Forest Society’s easement stewardship department (603-224-9945). We would much rather have you call with an easily answered question than to deal with a potential violation as the result of an inappropriate activity later.

The following covers the most common use limitations and other types of easement language that can affect forestry practices. They are separated by deed type and listed as you might see them in the document.

The Forest Society has supported responsible forest management since being founded in 1901.

TYPE 1 EASEMENTS

Language of Forestry Importance

(If the language in your easement is the same as the language in the excerpts below, it is a Type 1 easement.)

The introductory paragraphs of the easement deed clearly define the grantor and grantee of the rights contained as well as a reference to the legal or surveyed description of the land subject to the easement. Wording of that reference will be similar to the following:

‘...the Conservation Easement hereinafter described with respect to that certain parcel of land with any and all buildings, structures, and improvements thereon, situated on _____ road in the Town of _____, in the County of _____, State of New Hampshire, more particularly bounded and described in Appendix “A” attached hereto and made a part hereof.’

Understanding where the Easement property is located can save a lot of time and effort when it comes to project planning.

The Purposes section states the reasons for the easement which usually include:

- the preservation of open spaces for the scenic enjoyment of the general public;
- the conservation of productive forest land.

These are not specific limitations on management but they influence the way activities are interpreted should a question arise concerning any application of forestry practices.

The Use Limitations section includes six or seven clauses that, as mentioned, may or may not directly influence your practices. Before we get into this discussion section, there are several assumptions made: First, that foresters in New Hampshire follow Best Management Practices (BMP) and second, that foresters are not willing to risk their license on practices that are direct violations of law.



Road building comes to mind as one of the activities having the most impact.

TYPE 1 USE LIMITATION AS WRITTEN:

A. The Property shall be maintained in perpetuity as open space without there being conducted thereon any industrial or commercial activities, except agriculture and forestry as described below, and provided that the productive capacity of the Property to produce forest and/or agricultural crops shall not be degraded by on-site activities.

1. For the purposes hereof, "agriculture" and "forestry" shall include animal husbandry, floriculture, and horticulture activities: the production of plant and animal products for domestic or commercial purposes; the growing, stocking, cutting and sale of Christmas trees or forest trees of any size capable of producing timber or other forest products; and the processing and sale of products produced on the Property (such as pick-your-own fruits and vegetables and maple syrup) all as not detrimental to the scenic purposes of this Easement.

2. Agriculture and forestry on the property shall be performed, to the extent reasonably practicable, in accordance with a coordinated management plan for the sites and soils of the Property. Forestry and agricultural management activities shall be in accordance with the current scientifically based practices recommended by the U.S. Cooperative Extension, U.S. Soil Conservation Service, or other government or private, nonprofit natural resource conservation and management agencies then active. Management activities shall not materially impair the scenic quality of the Property as viewed from public roads or public trails.

B. The Property shall not be subdivided.

HOW IT MIGHT AFFECT YOUR MANAGEMENT:

⇒ You can easily meet the intent of this limitation if you:

- have discussed goals and objectives with the landowner;
- follow BMPs on your timber sales;
- use a written stewardship plan to guide your activities;
- use silvicultural prescriptions that are acceptable to the forestry community and normally applied in the northeast;
- manage so as to maintain the visual aesthetics of the property.



⇒ This article should have no impact on management

C. No structure or improvement, including, but not limited to, a dwelling, any portion of a septic system, tennis court, swimming pool, dock, aircraft landing strip, tower, or mobile home, shall be constructed, placed, or introduced onto the Property. However, ancillary structures and improvements including, but not limited to, a road, dam, fence, bridge, culvert, barn, maple sugar house, or shed may be constructed, placed, or introduced onto the Property only as necessary in the accomplishment of the agricultural, forestry, conservation, or noncommercial recreational uses of the Property and provided they are not detrimental to the scenic purposes of this Easement.

D. No removal, filling, or other disturbances of soil surface, nor any changes in topography, surface or sub-surface water systems, wetlands, or natural habitat shall be allowed unless such activities:

1. are commonly necessary in the accomplishment of the agricultural, forestry, conservation, habitat management, or noncommercial outdoor recreational uses of the Property; and,
2. do not harm state or federally recognized rare, threatened, or endangered species, or exemplary natural communities, such determination of harm to be based upon information from the New Hampshire natural Heritage Bureau or the agency then recognized by the State of New Hampshire as having responsibility for identification and/or conservation of such species; and,
3. are not detrimental to the Purposes of this Easement.

⇒ This is pretty self-explanatory. If you use structures or improvements to accomplish your (or your landowner's) forestry uses of the property, then the structures or improvements are allowed. Some of these listed items could be temporary while others could be permanent. Remember that once the forestry uses are fulfilled or accomplished, the structure or improvement should be removed if possible. On the other hand, a road built for timber removal could be retained and used to satisfy recreational purposes or provide landowner access other activities as long it is maintained to prevent erosion. Roads are sometimes blocked to prohibit damaging vehicular access but this is at the discretion of the landowner.

⇒ This is the limitation we saw before as an example of a potentially confusing clause. Like the limitation above, forestry related activities that involve any of the listed impacts to the property are still considered to be in compliance with the easement provided that all three listed conditions are also satisfied. Road-building comes to mind as the one of the activities having the most impact. In fact, building a road could involve all the listed resources, but if its location, design, and construction protects known threatened or endangered species, mitigates any visual impacts, and provides access to timber (as is commonly necessary,) it would still be in compliance with the easement. This clause may also contain a statement that requires all necessary federal, state, and local permits be secured prior to the commencement of any activity.



Understanding where the easement property is located can save a lot of time and effort when it comes to project planning.

We don't usually have signage on forestry projects, but if we did it and it didn't impair the scenic value of the land it would be OK.

E. No outdoor advertising structures such as signs and billboards shall be displayed on the Property except as desirable or necessary in the accomplishment of the agricultural, forestry, conservation or noncommercial recreational uses of the Property, and provided such signs are not detrimental to the purposes of this Easement.

⇒ We don't usually hang signage on forestry projects, but if we did and it didn't impair the scenic value of the land it would be OK. Tree Farm signs are OK.

F. There shall be no mining, quarrying, excavation, or removal of rocks, minerals, gravel, sand, topsoil, or other similar materials on the Property, except in connection with any improvements made pursuant to the provisions of paragraphs A., C., D., or E., above. No such rocks, minerals, sand, gravel, topsoil, or other similar materials shall be removed from the Property.

⇒ This limitation is similar to several of the previous ones. You can remove material to build a road, maintain recreational facilities, or maintain an earthen dam. You cannot remove any of the listed materials and then truck them off the property for any reason. And if you do remove material from a site for any of the allowed uses, you'll have to restore the excavated site or be in violation of limitation

G. There shall be no dumping, injection, burning, or burial of man-made materials, or materials then known to be environmentally hazardous.

⇒ This limitation shouldn't be an issue in forestry activities. Have your operators keep a clean landing and remove everything they brought to the site and all should be well. Man-made materials cover a very broad range of products including, antifreeze, oil, and hydraulic fluid, skidder chain, cable, old tires, cans, bottles, and plastic bags, engine parts, and items of clothing. Warming fires are a normal landing occurrence during the winter. The activity is allowed by the easement as long as only wood is being burned. It is assumed that the fire location will be restored using the same or similar treatment for landings.



After reviewing the Use Limitations section, read through some of the remaining sections of the easement deed. Of particular note are sections that contain information on reserved rights, required notifications, and anything to do with breach of easement and resolution of problems.

Following is the definition of “scientifically based forestry practices.”

Scientifically Based Forestry Practices Defined for Type 1 Easement Language

Scientifically based forestry practices, within the context of Forest Society-held conservation easements, are practices that focus on maintenance and/or improvement of stand quality for the future of the forest. Scientifically based forestry is guided by a coordinated management plan based on the sites and soils of the property and does not reduce the capacity of the property to yield a future forest crop. Both the plan and the on-the-ground scientifically based forestry practices reflect the following goals:

- Maintenance and/or improvement of species composition, stem quality, and stocking level.
- Minimization of mechanical damage from harvesting and other practices.
- Establishment, improvement or protection of regeneration.
- Protection of the site's hydrologic features and protection against sedimentation.
- Protection of the soil, avoiding indiscriminate skidding, rutting, compaction and erosion.
- Protection of unusual features such as critical wildlife habitat, high-elevation communities, rare plants or communities, old-growth forests.
- Conservation of native plant and animal species.

Scientifically based forestry practices are most often guided by a licensed professional forester, and

reflect the guidelines in the following publications:

- Good Forestry in the Granite State: Recommended Voluntary Forest Management Practices for New Hampshire, New Hampshire Forest Sustainability Standards Work Team, 1997.
- Best Management Practices for Erosion Control on Timber Harvesting Operations in New Hampshire, New Hampshire Division



For additional information concerning forestry practices and the maintenance of visual quality please see: *A Guide to Logging Aesthetics*, Geoffrey T. Jones, Society for the Protection of New Hampshire Forests, 1993.

Remember that as a forester, working in New Hampshire, you are already doing in the course of your “normal” work most of what an easement requires.

TYPE 2 EASEMENTS

Introduction

Most easements written after January 1997 contain expanded forestry language referred to as Type 2 language. Type 2 easements require that a licensed professional forester write and prepare a forest management plan for the property. Plans must address certain goals for resource protection and improvement, and be prepared or updated within a specified time prior to any harvest activity. These easements also require that the forester provide written certification that the plan was prepared in accordance with the terms of the easement. Under Type 2 language, all timber harvesting must be done in accordance with the plan, and be supervised by a licensed professional forester.

Management activities under Type 2 easements must still achieve the Purposes of the easement that in many cases have also been updated and expanded. In addition to maintaining or improving the productive capacity and the scenic quality of the property, Type 2 easements may add specific purposes dealing with:

- providing low-impact, non-commercial, outdoor recreational use;
- preservation of the biological diversity, native flora and fauna, natural habitats, and the supporting ecological processes which support them;
- maintenance of the unique characteristics of the property in its present condition;
- protection of the capacity of the property to produce economically valuable forest and/or agricultural crops;
- protecting the conservation characteristics of the property.

You will see as you read through the use limitations that Type 2 language is much more precise and less ambiguous than Type 1 language, at least as far as



forest management is concerned. It is impossible, however, to fully explore every possible occurrence on a property so there is still the need to read, understand and seek help in interpreting some of the ‘grayer’ wording.

The clauses that follow the Use Limitations also need a thorough review in the Type 2 easement deeds. Pay particular attention to any clause entitled Reserved Rights (we will discuss these in a later section of this guide) or Affirmative Obligation for Public Access (discussed earlier.) The Breach of Easement or Restrictions section is also very important as it explains the responsibilities of the landowner when a breach is determined. It also outlines the legal processes of notification and violation resolution.

As with all conservation easement deeds, you should review the property description in the appendix. Locating and marking the bounds of the protected lands on the ground will save you time and effort.

And, when you write your management plan for this type of easement land, be sure that the landowner’s objectives, the management plan, and your on-the-ground activities are all compatible with the purposes, goals, and use limitations of the conservation easement.

TYPE 2 USE LIMITATIONS

(Subject to the Grantor’s Reserved Rights specified in the subsequent section.)

The Property shall be maintained in perpetuity as open space subject to the following use limitations:



A. There shall not be conducted on the Property any industrial or commercial activities, except agriculture and forestry, including timber harvesting, as described below, and provided that the productive capacity of the Property to yield forest and/or agricultural crops shall not be degraded by on-site activities.

1. *For the purposes hereof, “agriculture” and “forestry” shall include animal husbandry, floriculture, and horticulture activities: the production of plant and animal products for domestic or commercial purposes; the growing, stocking, cutting and sale of Christmas trees or forest trees of any size capable of producing timber or other forest products; and the processing and sale of products produced on the Property (such as pick-your-own fruits and vegetables and maple syrup) all as not detrimental to the scenic purposes of this Easement.*

2. *Agriculture and forestry on the property shall be performed, to the extent reasonably practicable, in accordance with a coordinated management plan for the sites and soils of the Property. Forestry and agricultural management activities shall be in accordance with the current scientifically based practices recommended by the U.S. Cooperative Extension, U.S. Soil Conservation Service, or other government or private, nonprofit natural resource conservation and management agencies then active. Management activities shall not materially impair the scenic quality of the Property as viewed from public roads or public trails.*

HOW IT MIGHT AFFECT YOUR MANAGEMENT:

These should be familiar paragraphs by now. They were removed nearly verbatim from the Type 1 easement deed.



If the Forest Society holds the easement, one of their stewardship staff members can meet with you and your client to walk the site and discuss the proposed activities in light of the easement terms.

3. *Forestry for industrial or commercial purposes shall be performed, to the extent reasonably practicable, as hereinafter specified in accordance with the following goals, and in a manner not detrimental to the Purposes of these Restrictions.*

a. The goals are:

- maintenance of soil productivity;
- protection of water quality, wetlands, and riparian zones;
- maintenance or improvement of the overall quality of forest products;
- conservation of scenic quality;
- protection of unique or fragile natural areas;
- protection of unique historic and cultural features;
- conservation of native plant and animal species.

b. Such forestry shall be performed in accordance with a written forest management plan consistent with these Restrictions, prepared by a licensed professional forester, or by other qualified person approved in advance and in writing by the Society for the Protection of New Hampshire Forests (the Grantee).

Said plan shall have been prepared not more than ten years prior to the date any harvesting is expected to commence, or shall have been reviewed and updated as required by such a forester or other qualified person at least thirty (30) days prior to said date.

⇒ This is the first new language of the section. It sets the stage for your management by spelling out goal areas you probably already use. Using BMPs, buffers, avoiding areas with sensitive resources, and avoiding practices that enhance the opportunities for invasion by alien species are all techniques assumed by this clause. This should contain nothing out of the ordinary for a professional forester.



⇒ Here is the first mention that a management plan needs to be written. It is assumed in the Type 1 language but here it is spelled out. There is an opportunity for an unlicensed practitioner to write a plan with advanced approval of the Forest Society. Remember we are presenting the Forest Society's easements in this guide. Other grantees may have different requirements and language.

If you are planning a sale that was included in a previous version of a plan you will need to update the plan with current resource information before you harvest to be in compliance with this restriction.

c. At least thirty (30) days prior to harvesting, Grantee shall submit to Grantor a written certification, signed by a licensed professional forester, or by other qualified person approved in advance and in writing by the Grantor, that such plan has been prepared in compliance with the terms of these Restrictions. Grantor may request the Grantee to submit the plan itself to Grantor. Grantee agrees to submit the plan within ten (10) days of receipt of such request, and Grantor acknowledges that the plan's purpose is to guide forest management activities in compliance with these Restrictions, and that the actual activities will determine compliance therewith.

d. The plan shall include a statement of landowner objectives, and shall specifically address: the accomplishment of those Purposes for which these Restrictions are imposed; and the goals in Section 2.A.iii.a above.

e. Timber harvesting with respect to such forestry shall be conducted in accordance with said plan and be supervised by a licensed professional forester, or by other qualified person approved in advance and in writing by the Grantor.

f. Such forestry shall be carried out in accordance with all applicable local, state, federal, and other governmental laws and regulations, and, to the extent reasonably practicable, in accordance with then-current, generally accepted best management practices for the sites, soils, and terrain of the Property. For references, see Best Management Practices for Erosion Control on Timber Harvesting Operations in New Hampshire (J.B. Cullen, 1996), and Good Forestry in the Granite State: Recommended Voluntary Forest Management Practices for New Hampshire (New Hampshire Forest Sustainability Standards Work Team, 1997), or similar successor publications.

⇒ This new language requires a certification form (which is presented after this section) from the forester prior to any harvesting. The form certifies that the management plan is in place and is consistent with and addresses the purposes of the easement stated in Section 1; the forest management goals as listed in section 2.A.iii.a.; and the landowner's objectives. This is placed in the easement property's file and stewards review it prior to any ground monitoring. A copy of the plan is not initially required but can be requested from the forester. The last phrase of the clause can be a little confusing. What it means is that although a written plan exists, it is the on-the-ground activity that determines if management is in compliance with the easement's use limitations.

⇒ If you are familiar with the Stewardship Plan format, these items are included in every written plan you create. They are not special or unique to protected the property.

⇒ Again, it is what happens on the ground and not in the plan that determines compliance. We all know that there is no better way to manage all the resources affected by a timber sale than to have a forester involved in the sale administration. A Type 2 easement simply states that belief, as well.

⇒ Clause 'f' spells out that you need to follow the law in your forestry operations — the Intent is filed, the reports are completed on time, permits are obtained as needed from DES, etc. — all the common preparation that are part of a timber sale. We all refer to the BMPs and Good Forestry in the Granite State, and our continuing education requirements keep us up to date on changes in the profession. This clause introduces nothing new.





When you have a timber sale in a view-shed you should try to maintain the visual aesthetic.

g. In areas used by, or visible to, the general public, such forestry shall be carried out, to the extent reasonably practicable, in accordance with the recommendations contained in A Guide to Logging Aesthetics: Practical Tips for Loggers, Foresters, and Landowners (Geoffrey Jones, 1993) or similar successor publications.]

⇒ When you have a timber sale in a view-shed you should try to maintain the visual aesthetic. Notice that it says to the ‘extent reasonably practicable.’ The document does not assume you are miracle workers. There will be impacts, of course. Effort should be made to minimize any visual impacts associated with a harvest.

B. The Property shall not be subdivided [and none of the individual tracts which together comprise the Property shall be conveyed separately from one another,] except that the lease of any portion of the Property for any use permitted by these Restrictions shall not violate this provision.

⇒ This clause is self-explanatory and should not impact forest management unless the landowner is leasing some of the woodlands e.g. for a sugar bush) for purposes that would exclude your forest activities.

C. No structure or improvement shall be constructed, placed, or introduced onto the Property, except for structures and improvements that are: i) necessary in the accomplishment of the agricultural, forestry, conservation, habitat management, or noncommercial outdoor recreational uses of the Property and which may include but not be limited to a road, dam, fence, utility line, bridge, culvert, barn, maple sugar house, or shed; and ii) not detrimental to the Purposes of these Restrictions. Notwithstanding the above, there shall not be constructed, placed, or introduced onto the Property any of the following structures or improvements: dwelling, mobile home, cabin, residential driveway, any portion of a septic system, tennis court, swimming pool, athletic field, tower, golf course, or aircraft landing area.

⇒ This is nearly the same clause as in the Type 1 easement language. It is pretty self-explanatory. If the use of the structures or improvements is necessary to accomplish your (or your landowner’s) forest management, then the structure or improvement is allowed. Remember that if the forestry uses are fulfilled or accomplished, the structure or improvement should be removed. Unless, of course, it’s a road built for timber removal that could be retained and used to satisfy recreational purposes or provide landowner access as long it is maintained to prevent erosion.

Specific items may be added to the lists of included or prohibited features depending on the easement.

D. No removal, filling, or other disturbances of soil surface, nor any changes in topography, surface or subsurface water systems, wetlands, or natural habitat shall be allowed unless such activities:

⇒ This is also nearly verbatim from the Type 1 language. As we noted, forestry related activities that involve any of the listed impacts to the property are still considered to be in compliance with the easement provided that all three listed conditions are also satisfied. Road building comes to mind as one of the activities having

- are commonly necessary in the accomplishment of the agricultural, forestry, conservation, habitat management, or noncommercial outdoor recreational uses of the Property and,
- do not harm state or federally recognized rare, threatened, or endangered species, or exemplary natural communities, such determination of harm to be based upon information from the New Hampshire Natural Heritage Bureau or the agency then recognized by the State of New Hampshire as having responsibility for identification and/or conservation of such species and/or natural communities; and
- are not detrimental to the Purposes of these Restrictions.

Prior to commencement of any such activities, all necessary federal, state, local, and other governmental permits and approvals shall be secured. ⇒ Get your permits if required.

E. No outdoor advertising structures shall be displayed on the Property except as desirable or necessary in the accomplishment of the agricultural, forestry, conservation, habitat management, or noncommercial outdoor recreational uses of the Property, and provided such structures are not detrimental to the Purposes of these Restrictions. No sign on the Property shall exceed _____square feet in size and no sign shall be artificially illuminated. ⇒ Signage should not be a problem on forestry jobs. Tree Farm signs are OK as they promote the conservation values of the property. Temporary operator signage is also usually allowed as a promotion of good forestry practices. The Type 2 language adds negotiable square foot requirements and also prohibits lighted signs.

F. There shall be no mining, quarrying, excavation, or removal of rocks, minerals, gravel, sand, topsoil, or other similar materials on the Property, except in connection with any improvements made pursuant to the provisions of sections 2.A., C., D., or E., above. No such rocks, minerals, gravel, sand, topsoil, or other similar materials shall be removed from the Property. ⇒ Again language is the same as in the Type 1 easement language. You can remove materials to use on-site for maintenance and construction of roads and landings, but no material can be excavated and removed from the protected property. Areas impacted by excavation should be restored to a vegetated condition to prevent soil depletion, erosion, and restore site aesthetics.

the most impact. In fact, building a road could involve all the listed resources, but if the location, design, and construction of the road was done to protect known threatened or endangered species, mitigated any visual impacts, and was completed to provide access to timber (as is commonly necessary,) it would still be in compliance with the easement.

A final word of advice: Make sure to read and understand the easement deed.

Scientifically based forestry practices, within the context of Forest Society-held conservation easements, are practices that focus on maintenance and/or improvement of stand quality for the future of the forest.

G. There shall be no dumping, injection, burning, or burial of man-made materials or materials then known to be environmentally hazardous.

⇒ Remove all trash moved onto or created at the site of forestry operations. This clause covers overlooked items like the fluids from the equipment used at a logging operation. Hydraulic fluid, anti-freeze, oil, and diesel fuel are all man-made and hazardous. Clean up spills and restore the site.

H. No rights-of-way or easements of ingress or egress in favor of any third party shall be created or developed into, on, over, or across the Property without the prior written approval of the Grantor, except those of record as of the execution of this deed and those specifically permitted in the provisions of this deed.

⇒ This is a new clause to Type 2 easements. It provides a new layer of protection from unwanted development that may spring up behind or beyond the easement parcel. Roads often destroy the unique conservation values being protected by the easement.



FOLLOWING IS A COPY OF THE MANAGEMENT PLAN CERTIFICATION FORM REQUIRED BY THE TYPE 2 EASEMENT. YOU MUST SEND THIS FORM TO THE FOREST SOCIETY, AS EASEMENT GRANT-EE, AT LEAST 30 DAYS PRIOR TO THE START OF TIMBER HARVESTING ON THE PROTECTED LAND. (USE LIMITATIONS, PARAGRAPH A. 3. C. OF THE EASEMENT DEED.)

CERTIFICATION OF FOREST MANAGEMENT PLAN

I certify that I am a New Hampshire licensed professional forester (or other professional as approved by the Society for the Protection of New Hampshire Forests), and that I have prepared a forest management plan for _____ acres of the conservation easement-protected property owned by _____ in the town of _____, on which SPNHF is the easement holder.

The management plan is consistent with and addresses the purposes of the easement stated in Section 1 of the easement, the forest management goals as listed in section 2.A.iii.a. of the easement, and the landowner's objectives. Harvest of the property subject to the plan is anticipated to begin in

_____, _____ YEAR
MONTH YEAR

FORESTER SIGNATURE

LICENSE

FORESTER NAME - PLEASE PRINT

DATE

FORESTER'S SEAL

A COPY OF THIS FORM APPROPRIATE FOR REPRODUCTION AND USE IS INCLUDED AS APPENDIX C OF THIS GUIDE. COPIES CAN ALSO BE OBTAINED FROM THE FOREST SOCIETY OFFICE OR ON THE FOREST SOCIETY'S WEBSITE AT

www.forestsociety.org/landconservation/



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TO CONSERVATION EASE-



PART 3: RESERVED RIGHTS

Reserved rights are specific rights reserved to, and for the sole benefit of, the grantor. They are each separately negotiated during the development of the easement deed. Why is this important to foresters? Reserved rights may include opportunities to conduct activities that are not included in the management plan. For example, it may include the right to remove vegetation that blocks or interferes with a view without regard to the underlying silviculture of the trees that populate the area to be cleared.

Withdrawals are another issue often covered in the Reserved Rights section of the deed. A withdrawal is an area that can, at some point in time, either predetermined or at the discretion of the grantor, be removed from the protection of the easement deed. Withdrawals may be planned for in the deed to satisfy a previous commitment (like a right of first refusal) or be included to provide some flexibility in the future (like providing each child with a building location on the old homestead). Withdrawals can affect your forest management by removing land you have previously managed. Or, as another example, it could result in the upgrading of roads from occasional timber hauling to constant residential use which would increase maintenance costs and could limit future operations.

Other examples of reserved rights include:

- the ability to repair, replace, upgrade, or maintain water and septic systems that may extend into the protected area;
- the same rights of maintaining, upgrading, replacing and repairing might also apply to cabins or existing access roads, even where the maintenance involves the removal of gravel;
- the right to conduct archeological research on the property including digs and in-ground scientific exploration;

- the right to establish flood control measures related to specific streams or water bodies located on the property;
- the right to subdivide specific tracts from the body of the easement area;
- the right to separately convey the individual parcels that compose the entire property covered by the deed.

With a little imagination, you can see how some of these could affect your commercial and perhaps pre-commercial forestry activities.

One important thing to remember about conservation easements is that if an activity is not specifically restricted or prohibited, it is allowed. The easement must outline or list all of the restrictions that apply to that particular piece of land. For instance, if the easement doesn't mention restricting the construction of ponds and you can get the appropriate permits from DES, then it is allowed. Don't get restrictions and reserved rights confused with the recreational activities mentioned in the Current Use regulations or with any of the other Current Use requirements. Conservation easements and Current Use are two separate and distinct programs with somewhat similar goals but completely different methods and enforcement.

Summary

A final word of advice: Make sure to read and understand the easement deed. Ask questions when you need and remember that every easement is different—different grantors, different goals, desires and wishes, different land, different time, different source of the money to buy the easement rights, some with additional constraints and some without. Also remember that as a forester working in New Hampshire, you are already doing in the course of your 'normal' work most of what an easement requires.



Appendices

GENERIC TYPE 2 CONSERVATION EASEMENT DEED

(for reference only)

[NAME OF GRANTOR(S)], single/husband and wife, of/with a principal place of business at [street name and number], Town/City of _____, County of _____, State of New Hampshire, (hereinafter referred to as the “Grantor”, which word where the context requires includes the plural and shall, unless the context clearly indicates otherwise, include the Grantor’s executors, administrators, legal representatives, devisees, heirs, successors and assigns), for consideration paid, with WARRANTY covenants, grant[s] in perpetuity to the SOCIETY FOR THE PROTECTION OF NEW HAMPSHIRE FORESTS, a corporation duly organized and existing under the laws of the State of New Hampshire, with a principal place of business at 54 Portsmouth Street, City of Concord, County of Merrimack, State of New Hampshire, 03301-5400, having been determined by the Internal Revenue Service to be an income tax exempt, publicly supported corporation, contributions to which are deductible for federal income tax purposes pursuant to the United States Internal Revenue Code, [Town or City of _____, a municipal corporation, situated in the County of _____, State of New Hampshire, acting through its Conservation Commission pursuant to NH RSA 36-A:4, with a mailing address of _____,] (hereinafter referred to as the “Grantee” which shall, unless the context clearly indicates otherwise, include the Grantee’s successors and assigns),

the Conservation Easement (herein referred to as the “Easement”) hereinafter described with respect to that certain parcel/area of land (herein referred to as the “Property”) with any and all buildings, structures, and improvements thereon/being unimproved land, consisting of approximately ____ acres, situated on [street name] in the Town/City of _____, County of _____, State of New Hampshire, more particularly bounded and described in Appendix “A” attached hereto and made a part hereof.

1. Purposes

The Easement hereby granted is pursuant to NH RSA 477:45-47, exclusively for the following conservation Purposes (herein referred to as the “Purposes”) for the public benefit:

May include any or all of the following

A. The protection of the [unusual] natural habitat of _____ [including the enhancement and enlargement of ____ acres of protected land which is adjacent to/nearby the Property, said other land including (name & acreage)]; and

B. The conservation [and protection] of open spaces, particularly the conservation of the productive farm and/or forest land of which the Property consists and of the wildlife habitat thereon [add specific resource values relevant to this purpose], [and the protection of the undeveloped feet of water frontage along the (name of water body), to which the Property provides access and upon which it fronts], and the long-term protection of the Property’s capacity to produce economically valuable agricultural and forestry products [add specific resource features relevant to this purpose, e.g. soil productivity classification]; and

C. The scenic enjoyment of the general public :

D. The protection of the quality [and availability] of ground water and surface water resources on and under the Property [add specific resource features relevant to this purpose]; and]

E. insert additional purposes, as appropriate]

The above Purposes are consistent with the clearly delineated open space conservation goals and/or

objectives as stated in the [date] Master Plan of the Town/City of _____, which states “_____” and with New Hampshire RSA Chapter 79-A which states: “It is hereby declared to be in the public interest to encourage the preservation of open space, thus providing a healthful and attractive outdoor environment for work and recreation of the state’s citizens, maintaining the character of the state’s landscape, and conserving the land, water, forest, agricultural and wildlife resources.”

All of these Purposes are consistent and in accordance with the U.S. Internal Revenue Code, Section 170(h).

The Easement hereby granted with respect to the Property is as follows:

2. Use Limitations

(Subject to the reserved rights specified in Section 3 below)

The Property shall be maintained in perpetuity as open space subject to the following use limitations:

A. There shall not be conducted on the Property any industrial or commercial activities, except agriculture and forestry, including timber harvesting, as described below, and provided that the productive capacity of the Property to yield forest and/or agricultural crops shall not be degraded by on-site activities.

i. For the purposes hereof, “agriculture” and “forestry” shall include animal husbandry, floriculture, and horticulture activities; the production of plant and animal products for domestic or commercial purposes; the growing, stocking, cutting, and sale of Christmas trees or forest trees of any size capable of producing timber or other forest products; the construction of roads or other accessways for the purpose of removing forest products from the Property; and the processing and sale of products produced on the Property (such as pick-your-own fruits and vegetables and maple syrup), all as not detrimental to the Purposes of this Easement.

ii. Agriculture for industrial or commercial purposes shall be performed, to the extent reasonably practicable, in accordance with a coordinated management plan for the sites and soils of the Property. Said agriculture shall be in accordance with the then-current scientifically based practices recommended by the UNH Cooperative Extension, U.S. Natural Resources Conservation Service, or other government or private, nonprofit natural resource conservation and management agencies then active. Said agricultural activities shall not be detrimental to the Purposes of this Easement, nor materially impair the scenic quality of the Property as viewed from [public waterways, great ponds, public roads, or public trails].

iii. Forestry for industrial or commercial purposes shall be performed, to the extent reasonably practicable, as hereinafter specified in accordance with the following goals, and in a manner not detrimental to the Purposes of this Easement.

a. *The goals are:*

- maintenance of soil productivity;
- protection of water quality, wetlands, and riparian zones;
- maintenance or improvement of the overall quality of forest products;
- conservation of scenic quality;
- protection of unique or fragile natural areas;
- protection of unique historic and cultural features; and
- conservation of native plant and animal species.

b. Such forestry shall be performed in accordance with a written forest management plan consistent with this Easement, prepared by a licensed professional forester, or by other qualified person approved in advance and in writing by the Grantee. Said plan shall have been prepared not more than ten years prior to the date any harvesting is expected to commence, or shall have been reviewed and updated as required by such a forester or other qualified person at least thirty (30) days prior to said date.

c. At least thirty (30) days prior to harvesting, Grantor shall submit to Grantee a written certification, signed by a licensed professional forester, or by other qualified person approved in advance and in writing by the Grantee, that such plan has been prepared in compliance with the terms of this Easement. Grantee may request the Grantor to submit the plan itself to Grantee within ten (10) days of such request, but acknowledges that the plan's purpose is to guide forest management activities in compliance with this Easement, and that the actual activities will determine compliance therewith.

d. The plan shall include a statement of landowner objectives, and shall specifically address:

- the accomplishment of those Purposes for which this easement is granted;
- the goals in Section 2.A.iii.a above; and
- [insert specific parameters that should be addressed during forest management, such as special water quality considerations, special plant and wildlife concerns, scenic and recreational considerations, etc. as appropriate to the particular parcel]

e. Timber harvesting with respect to such forestry shall be conducted in accordance with said plan and be supervised by a licensed professional forester, or by other qualified person approved in advance and in writing by the Grantee.

f. Such forestry shall be carried out in accordance with all applicable local, state, federal, and other laws

and regulations, and, to the extent reasonably practicable, in accordance with then-current, generally accepted best management practices for the sites, soils, and terrain of the Property. For references, see "Best Management Practices for Erosion Control on Timber Harvesting Operations in New Hampshire" (J.B. Cullen, 1996), and "Good Forestry in the Granite State: Recommended Voluntary Forest Management Practices for New Hampshire" (New Hampshire Forest Sustainability Standards Work Team, 1997), or similar successor publications.

[use the next paragraph for properties with significant recreational features used by the public, properties with extensive scenic resources, and for easements that specifically provide for public access]:

g. In areas used by, or visible to the general public, such forestry shall be carried out, to the extent reasonably practicable, in accordance with the recommendations contained in "A Guide to Logging Aesthetics: Practical Tips for Loggers, Foresters, and Landowners" (Geoffrey Jones, 1993) or similar successor publications.]

B. The Property shall not be subdivided [and none of the individual tracts which together comprise the Property shall be conveyed separately from one another], except that the lease of any portion of the Property for any use permitted by this Easement shall not violate this provision.

C. No structure or improvement shall be constructed, placed, or introduced onto the Property, except for structures and improvements which are: i) necessary in the accomplishment of the agricultural, forestry, conservation, habitat management, or noncommercial outdoor recreational uses of the Property and which may include but not be limited to a road, dam, fence, utility line, bridge, culvert, barn, maple sugar house, or shed; and ii) not detrimental to the Purposes of this Easement. Notwithstanding the above, there shall not be constructed, placed, or introduced onto the Property any of the following structures or improvements: dwelling, mobile home, cabin, residential driveway, any portion of a septic system, tennis court, swimming pool, athletic field, golf course, or aircraft landing area.

D. No removal, filling, or other disturbances of soil surface, nor any changes in topography, surface or subsurface water systems, wetlands, or natural habitat shall be allowed unless such activities:

- i. *are commonly necessary in the accomplishment of the agricultural, forestry, conservation, habitat management, or noncommercial outdoor recreational uses of the Property; and*
- ii. *do not harm state or federally recognized rare, threatened, or endangered species, or exemplary natural communities, such determination of harm to be based upon information from the New Hampshire Natural Heritage Bureau or the agency then recognized by the State of New Hampshire as having responsibility for identification and/or conservation of such species and/or natural communities; and*
- iii. *are not detrimental to the Purposes of this Easement.*

Prior to commencement of any such activities, all necessary federal, state, local, and other governmental permits and approvals shall be secured.

E. No outdoor advertising structures shall be displayed on the Property except as desirable or necessary

in the accomplishment of the agricultural, forestry, conservation, or noncommercial outdoor recreational uses of the Property, and provided such structures are not detrimental to the Purposes of this Easement. No sign on the Property shall exceed _____square feet in size, and no sign shall be artificially illuminated.

F. There shall be no mining, quarrying, excavation, or removal of rocks, minerals, gravel, sand, topsoil, or other similar materials on the Property, except in connection with any improvements made pursuant to the provisions of sections 2.A., C., D., or E., above. No such rocks, minerals, gravel, sand, topsoil, or other similar materials shall be removed from the Property.

G. There shall be no dumping, injection, burning, or burial of man-made materials or materials then known to be environmentally hazardous.

H. No rights-of-way or easements of ingress or egress in favor of any third party shall be created or developed into, on, over, or across the Property without the prior written approval of the Grantee, except those of record as of the execution of this Easement and those specifically permitted in the provisions of this Easement.

[add any additional restrictions as appropriate for the Property]

3. Reserved Rights

A. [insert at end of each reserved right as appropriate] This provision is an exception to 2.____. above.

B. The Grantor must notify the Grantee in writing at least thirty (30) days before any exercise of the aforesaid reserved rights.

4. Notification of Transfer, Taxes, Maintenance

A. The Grantor agrees to notify the Grantee in writing at least 10 days before the transfer of title to the Property [or any division of ownership thereof permitted hereby].

B. The Grantee shall be under no obligation to maintain the Property or pay any taxes or assessments thereon.

5. Benefits and Burdens

The burden of the Easement conveyed hereby shall run with the Property and shall be enforceable against all future owners and tenants in perpetuity; the benefits of this Easement shall not be appurtenant to any particular parcel of land but shall be in gross and assignable or transferable only to the State of New Hampshire, the U.S. Government, or any subdivision of either of them, consistent with Section 170(c) (1) of the U.S. Internal Revenue Code of 1986, as amended, or to any qualified organization within the meaning of Section 170(h)(3) of said Code, which organization has among its purposes the conservation and preservation of land and water areas, agrees to and is capable of protecting the conservation purposes of this Easement, and has the resources to enforce the restrictions of this Easement. Any such assignee or transferee shall have like power of assignment or transfer.

6. Affirmative Rights of Grantee

A. The Grantee shall have reasonable access to the Property and all of its parts for such inspection as is necessary to determine compliance with and to enforce this Easement and exercise the rights conveyed hereby and fulfill the responsibilities and carry out the duties assumed by the acceptance of this Easement.

[B. To facilitate such inspection and to identify the Property as conservation land protected by the Grantee, the Grantee shall have the right to place signs, each of which shall not exceed 24 square inches in size, along the Property's boundaries.]

7. Resolution of Disagreements

A. The Grantor and the Grantee desire that issues arising from time to time concerning uses or activities in light of the provisions of the Easement will first be addressed through candid and open communication between the parties rather than unnecessarily formal or adversarial action. Therefore, the Grantor and the Grantee agree that if either party becomes concerned whether any use or activity (which together for the purposes of this Section, "Resolution of Disagreements," shall be referred to as the "Activity") complies with the provisions of this Easement, wherever reasonably possible the concerned party shall notify the other party of the perceived or potential problem, and the parties shall explore the possibility of reaching an agreeable resolution by informal dialogue.

B. If informal dialogue does not resolve a disagreement regarding the Activity, and the Grantor agrees not to proceed or to continue with the Activity pending resolution of the disagreement concerning the Activity, either party may refer the disagreement to mediation by written notice to the other. Within ten (10) days of the delivery of such a notice, the parties shall agree on a single impartial mediator. Mediation shall be conducted in Concord, New Hampshire, or such other location as the parties shall agree. Each party shall pay its own attorneys' fees and the costs of mediation shall be split equally between the parties.

C. If the parties agree to bypass mediation, if the disagreement concerning the Activity has not been resolved by mediation within sixty (60) days after delivery of the notice of mediation, or if the parties are unable to agree on a mediator within ten (10) days after delivery of the notice of mediation, the disagreement shall be submitted to binding arbitration in accordance with New Hampshire RSA 542. The Grantor and the Grantee shall each choose an arbitrator within twenty (20) days of the delivery of written notice from either party referring the matter to arbitration. The arbitrators so chosen shall in turn choose a third arbitrator within twenty (20) days of the selection of the second arbitrator. The arbitrators so chosen shall forthwith set as early a hearing date as is practicable, which they may postpone only for good cause shown. The arbitration hearing shall be conducted in Concord, New Hampshire, or such other location as the parties shall agree. A decision by two of the three arbitrators, made as soon as practicable after submission of the matter, shall be binding upon the parties and shall be enforceable as part of this Easement.

D. Notwithstanding the availability of mediation and arbitration to address disagreements concerning the compliance of any Activity with the provisions of this Easement, if the Grantee believes that some action or inaction of the Grantor or a third party is causing irreparable harm or damage to the Property, the Grantee may seek a temporary restraining order, preliminary injunction or other form of equitable relief from any court of competent jurisdiction to cause the cessation of any such damage or harm, to enforce the terms of this Easement, to enjoin any violation by permanent injunction, and to require the restoration of the Property to its condition prior to any breach.

8. Breach of Easement – Grantee’s Remedies

A. If the Grantee determines that a breach of this Easement has occurred or is threatened, the Grantee shall notify the Grantor in writing of such breach and demand corrective action to cure the breach and, where the breach involves injury to the Property, to restore the portion of the Property so injured to its prior condition.

B. The Grantor shall, within thirty (30) days after receipt of such notice or after otherwise learning of such breach, undertake those actions, including restoration, which are reasonably calculated to cure swiftly said breach and to repair any damage. The Grantor shall promptly notify the Grantee of its actions taken hereunder.

C. If the Grantor fails to perform its obligations under the immediately preceding paragraph B. above, or fails to continue diligently to cure any breach until finally cured, the Grantee may undertake any actions that are reasonably necessary to repair any damage in the Grantor’s name or to cure such breach, including an action at law or in equity in a court of competent jurisdiction to enforce the terms of this Easement, to enjoin the violation, ex parte as necessary, by temporary or permanent injunction, and to require the restoration of the Property to the condition that existed prior to any such injury.

D. If the Grantee, in its sole discretion, determines that circumstances require immediate action to prevent or mitigate significant damage to the conservation features of the Property, the Grantee may pursue its remedies under this Section, “Breach of Easement...,” without prior notice to the Grantor or without waiting for the period provided for cure to expire.

E. The Grantee shall be entitled to recover damages from the party directly or primarily responsible for violation of the provisions of this Easement or injury to any conservation features protected hereby, including, but not limited to, damages for the loss of scenic, aesthetic, or environmental attributes of the Property. Without limiting the Grantor’s liability therefore, the Grantee, in its sole discretion, may apply any damages recovered to the cost of undertaking any corrective action on the Property.

F. The Grantee’s rights under this Section, “Breach of Easement...,” apply equally in the event of either actual or threatened breach of this Easement, and are in addition to the provisions of the preceding Section, “Resolution of Disagreements,” which section shall also apply to any disagreement that may arise with respect to activities undertaken in response to a notice of breach and the exercise of the Grantee’s rights hereunder.

G. The Grantor and the Grantee acknowledge and agree that should the Grantee determine, in its sole discretion, that the conservation features protected by this Easement are in immediate danger of irreparable harm, the Grantee may seek the injunctive relief described in the third paragraph of this Section, “Breach of Easement...,” both prohibitive and mandatory, in addition to such other relief to which the Grantee may be entitled, including specific performance of the terms of this Easement, without the necessity of proving either actual damages or the inadequacy of otherwise available legal remedies. The Grantee’s remedies described in this Section, “Breach of Easement...,” shall be cumulative and shall be in addition to all remedies now or hereafter existing at law or in equity.

H. Provided that the Grantor is directly or primarily responsible for the breach, all reasonable costs

incurred by the Grantee in enforcing the terms of this Easement against the Grantor, including, without limitation, staff and consultant costs, reasonable attorneys’ fees and costs and expenses of suit, and any costs of restoration necessitated by the Grantor’s breach of this Easement shall be borne by the Grantor; and provided further, however, that if the Grantor ultimately prevails in a judicial enforcement action each party shall bear its own costs. Notwithstanding the foregoing, if the Grantee initiates litigation against the Grantor to enforce this Conservation Easement, and if the court determines that the litigation was initiated without reasonable cause or in bad faith, then the court may require the Grantee to reimburse the Grantor’s reasonable costs and reasonable attorney’s fees in defending the action.

I. Forbearance by the Grantee to exercise its rights under this Easement in the event of any breach of any term thereof by the Grantor shall not be deemed or construed to be a waiver by the Grantee of such term or of any subsequent breach of the same or any other term of this Easement or of any of the Grantee’s rights hereunder. No delay or omission by the Grantee in the exercise of any right or remedy upon any breach by the Grantor shall impair such right or remedy or be construed as a waiver. The Grantor hereby waives any defense of laches or estoppel.

J. Nothing contained in this Easement shall be construed to entitle the Grantee to bring any action against the Grantor for any injury to or change in the Property resulting from causes beyond the Grantor’s control, including, but not limited to, unauthorized actions by third parties, natural disasters such as fire, flood, storm, disease, infestation and earth movement, or from any prudent action taken by the Grantor under emergency conditions to prevent, abate, or mitigate significant injury to the Property resulting from such causes. The Grantee and the Grantor reserve the right, separately or collectively, to pursue all legal and/or equitable remedies, as set forth in this Section, “Breach of Easement...,” against any third party responsible for any actions inconsistent with the provisions of this Easement.

9. Executory Interest

A. If the Grantee ceases to enforce the Easement conveyed hereby or fails to enforce it within thirty (30) days after receipt of written notice from [name]_____, a qualified organization as specified in the Section “Benefits and Burdens” above (sometimes herein referred to as the “Executory Interest Holder”), requesting such enforcement delivered in hand or by certified mail, return receipt requested, then the Executory Interest Holder shall have the right to enforce this Easement. All reasonable costs of such enforcement shall be paid by the Grantee. In such circumstance, or in the event the Grantee acquires the underlying fee interest in the Property, the Executory Interest Holder shall then also have the right to terminate the Easement interest of the Grantee in the Property by recording a notice to that effect in the Registry of Deeds referring hereto and shall thereupon assume and thereafter have all interests, rights, responsibilities and duties granted to and incumbent upon the Grantee in this Easement.

B. The interests held by the Executory Interest Holder are assignable or transferable to any party qualified to become the Grantee’s assignee or transferee as specified in the Section “Benefits and Burdens” above. Any such assignee or transferee shall have like power of assignment or transfer.]

10. Notices

All notices, requests and other communications, required to be given under this Easement shall be in writing, except as otherwise provided herein, and shall be delivered in hand or sent by certified mail, postage prepaid, return receipt requested to the appropriate address set forth above or at such other address as the Grantor or the Grantee may hereafter designate by notice given in accordance herewith. Notice shall be deemed to have been given when so delivered or so mailed.

11. Severability

If any provision of this Easement, or the application thereof to any person or circumstance, is found to be invalid by a court of competent jurisdiction, by confirmation of an arbitration award or otherwise, the remainder of the provisions of this Easement or the application of such provision to persons or circumstances other than those to which it is found to be invalid, as the case may be, shall not be affected thereby.

12. Condemnation / Extinguishment

A. Whenever all or part of the Property is taken in exercise of eminent domain by public, corporate, or other authority so as to abrogate in whole or in part the Easement conveyed hereby, or whenever all or a part of the Property is lawfully sold without the restrictions imposed hereunder in lieu of exercise of eminent domain, the Grantor and the Grantee shall thereupon act jointly to recover the full damages resulting from such taking with all incidental or direct damages and expenses incurred by them thereby to be paid out of the damages recovered.

B. [The balance of the land damages recovered from such taking or lawful sale in lieu of exercise of eminent domain shall be divided between the Grantor and the Grantee in proportion to the fair market value of their respective interests in the Property on the date of execution of this Easement. For this purpose and that of any other judicial extinguishment of this Easement, in whole or in part, the Grantee's interest shall be the amount by which the fair market value of the Property immediately prior to the execution of this Easement is reduced by the use limitations imposed hereby. The value of the Grantee's interest shall be determined by an appraisal prepared [for federal income tax purposes] by a qualified appraiser within one year of the date of this Easement, and submitted to the Grantee.]

[or use the following when no charitable deduction will be sought]

[The balance of the land damages recovered from such taking or lawful sale in lieu of exercise of eminent domain shall be divided between the Grantor and the Grantee in proportion to the fair market value, at the time of condemnation, of their respective interests in that part of the Property condemned. For this purpose and that of any other judicial extinguishment of this Easement, in whole or in part, the values of the Grantor's and Grantee's interests shall be determined by an appraisal prepared by a qualified appraiser at the time of condemnation or extinguishment.]

C. The Grantee shall use its share of the proceeds resulting from condemnation or extinguishment in a manner consistent with and in furtherance of one or more of the conservation purposes set forth herein.

13. Additional Easement

Should the Grantor determine that the expressed Purposes of this Easement could better be effectuated by the conveyance of an additional easement, the Grantor may execute an additional instrument to that effect, provided that the conservation purposes of this Easement are not diminished thereby and that a public agency or qualified organization described in the Section "Benefits and Burdens," above, accepts and records the additional easement.

[THIS IS A NON-CONTRACTUAL CONVEYANCE PURSUANT TO NEW HAMPSHIRE RSA 78-B:2 AND IS EXEMPT FROM THE NEW HAMPSHIRE REAL ESTATE TRANSFER TAX.]

The Grantee, by accepting and recording this Easement, agrees to be bound by and to observe and enforce the provisions hereof and assumes the rights and responsibilities herein granted to and incumbent upon the Grantee, all in the furtherance of the conservation purposes for which this Easement is delivered.

[Insert all necessary signatures and certifications for recording]

Conservation Easement Appendix (A)

The "Property" subject to this Easement is that tract of land with any and all structures and improvements thereon situated on Road,____, in the Town of____, County of _____, State of New Hampshire, consisting of approximately _____ acres, shown on a plan entitled "____", by____, last revised _____, recorded at _____at the County Registry of Deeds (hereafter "Plan"), and more particularly bounded and described as follows:

Beginning at ____ on the__side of Road, at the ____ corner of the Property, at land now or formerly of _____;

Thence proceeding ____ a distance of ____ feet, more or less, along said ____ land to__at land now or formerly of _____;

Thence proceeding ____ a distance of ____ feet, more or less, along said ____ land to a ____at land now or formerly of _____;

Thence the following courses and distances along said xxxx land:

Thence xxx feet along the arc of a curve to the left/right having a radius of xxx feet to a____;

to [point], which is on a tie course of [bearing] xxx feet from [point]

EXCEPTING AND RESERVING THEREFROM _____

SUBJECT TO _____

TOGETHER WITH _____

MEANING AND INTENDING to describe all and the same/a portion of the premises conveyed by Deed from _____, to _____, dated _____, recorded at said Registry at Book____, Page _____.

[Not homestead property of the Grantor.]

Optional Clauses

THE FOLLOWING ADDITIONAL OPTIONAL CLAUSES ARE TO BE INSERTED WITHIN THE CE DEED WHEN THEY ARE APPLICABLE: SEPARATE PARCEL [Add as new Section to prevent possibly more intensive development on adjacent land owned now, or in the future, by the same party.]

The Grantor agrees that for the purpose of determining compliance of any land of the Grantor other than the Property with any present or future regulation (other than those governing N.H. Current Use Assessment under RSA 79-A), bylaw, order, or ordinance (collectively within this section referred to as "legal requirements") of the Town/City of [name], the State of New Hampshire or any other governmental unit, the Property shall be deemed to be a separate non-contiguous parcel whose characteristics, including but not limited to acreage and road frontage, shall not be taken into account in making such determination.

TRUSTEE CERTIFICATION, (IF NOT ALREADY SEPARATELY RECORDED); (INSERT AS FIRST PARAGRAPH OF DEED) November 1992; and

I/WE (name) as Trustee(s) of the (name of trust) dated (date), as amended, with a mailing address of (address), hereby certify that as such Trustee(s) I/we have full and absolute power thereunder to convey any interest in real estate and the improvements thereon held therein and no purchaser or third party shall be bound to inquire whether as such Trustee(s) I/we have said power or am/are properly exercising said power or to see to the application of any trust asset paid to me/us as such Trustee(s) for a conveyance thereof, and I/we (hereinafter referred to as the "Grantor", which word where the context requires includes the plural and shall, unless the context clearly indicates otherwise, include the Grantor's successors and assigns), [by the power conferred by said Trust, RSA 564-A, and every other power,] [add text in prior brackets only if fiduciary or quitclaim deed; not needed if warranty deed]

for consideration paid, with WARRANTY [QUITCLAIM/FIDUCIARY] covenants, grant in perpetuity to

Public Access

Add to Section 1 "Purposes":

A. The protection of the Property [and the water body of (name of water body) to which it provides access and on which it fronts] for outdoor recreation by and/or the education of the general public.

and Insert as new "Use Limitation"

The Property shall not be posted against, and the Grantor shall keep access to and use of the Property [or specified portions] open to the public for, [such] [non-motorized, non-wheeled, pedestrian] non-commercial, outdoor recreational and outdoor educational purposes [as will have minimal impact on the Property], such as but not limited to hiking, wildlife observation, cross-country skiing, fishing, [horseback riding, mountain biking, snowmobiling, and hunting], but not for camping [or hunting]. However, the Grantee shall be under no duty to supervise said access, use, or purpose. The Grantor reserves the right to post the Property against public access to agricultural cropland during the planting and growing season, to lands while being grazed by livestock, and to forestland during harvesting or other forest management activities.

Agricultural Best management Practices

(Substitute for Sect. 2.A.ii)

Agriculture for industrial or commercial purposes shall be performed, to the extent reasonably practicable, in accordance with a coordinated management plan for the sites and soils of the Property. Said agriculture shall not be detrimental to the Purposes of this Easement, nor materially impair the scenic quality of the Property as viewed from public roads or public trails. Said agricultural activities shall be in accordance with the then-current scientifically based practices recommended by the UNH Cooperative Extension, U.S. Natural Resources Conservation Service, or other government or private, nonprofit natural resource conservation and management agencies then active, and shall be in accordance with "best management practices" as set forth in the following publications or as these publications may be specifically updated or superseded:

- a. "Manual of Best Management Practices for Agriculture in New Hampshire," New Hampshire Department of Agriculture, as amended August 1998; and
 - b. "Pesticide Management Guidelines for Groundwater Protection," University of New Hampshire Cooperative Extension,
 - c. "Buffers for Wetlands and Surface Waters: A Guidebook for New Hampshire Municipalities," Audubon Society of New Hampshire, New Hampshire Office of State Planning, University of New Hampshire Cooperative Extension, U.S. Natural Resources Conservation Service, as revised May 1997; and
 - d. "Best Management Practices: Biosolids," University of New Hampshire Cooperative Extension, 1995;
- and
- e. "Best Management Practices to Control Nonpoint Source Pollution: A Guide for Citizens and Town Officials," New Hampshire Department of Environmental Services, as revised January 2004.

CERTIFICATION OF FOREST MANAGEMENT PLAN

I certify that I am a New Hampshire licensed professional forester (or other professional as approved by the Society for the Protection of New Hampshire Forests), and that I have prepared a forest management plan for _____ acres of the conservation easement-protected property owned by _____ in the town of _____, on which SPNHF is the easement holder.

The management plan is consistent with and addresses the purposes of the easement stated in Section 1 of the easement, the forest management goals as listed in section 2.A.iii.a. of the easement,

and the landowner's objectives. Harvest of the property subject to the plan is anticipated to begin in

MONTH _____, YEAR _____.

FORESTER SIGNATURE

LICENSE

FORESTER NAME - PLEASE PRINT

DATE

FORESTER'S SEAL

REFERENCES

Byers, Elizabeth and Ponte, Karen. *The Conservation Easement Handbook*, 2nd Edition. Washington, DC: The Land Trust Alliance and The Trust for Public Land, 2005

Cullen, J.B. *Best Management Practices for Erosion Control on Timber Harvesting Operations in New Hampshire*. Concord, NH: State of New Hampshire Department of Resource and Economic Development, Forest and Lands, 1996

Land Trust Alliance. *Land Trust Standards and Practices*, Revised 2004. Washington, DC: Land Trust Alliance, 2004

Lind, Brenda. *Working Forest Conservation Easements: A Process Guide for Land Trusts, Landowners and Public Agencies*. Washington, DC: Land Trust Alliance, 2001.

New Hampshire Forest Sustainability Standards Work Team. *Good Forestry in the Granite State: Recommended Voluntary Forest Management Practices for New Hampshire*. Concord, NH: State of New Hampshire and University of New Hampshire Cooperative Extension, 1997.

NOTES

\$9.95 US



“Conservation is the foresighted utilization, preservation and/or renewal of forests, waters, lands and minerals, for the greatest good of the greatest number for the longest time.”

–Gifford Pinchot

The Society for the Protection of New Hampshire Forests is a non-profit membership organization founded in 1901 that has helped protect over one million acres in the state. The Forest Society has on-going programs in land protection, environmental education, advocacy, research, and sustainable forest management.



The Society for the Protection of New Hampshire Forests envisions a living landscape where managed woodlands, farms, and wildlands are woven into the fabric of community life. We envision people caring for lands that sustain communities with clean water and air, employment, forest and agricultural products, habitat for native plants and animals, scenic beauty, and recreational opportunities.



**SOCIETY FOR THE
PROTECTION OF
NEW HAMPSHIRE
FORESTS**

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