

Site Protection Basics



What do we mean by site protection?

It means to have the natural resource values that either currently exist on the land, or intended to exist through establishment or restoration activities, permanently* protected by a legal instrument.

**depending on state law*

What legal instruments are used for site protection?

Conservation easements

Other instruments that have been used in the past for compensatory mitigation projects, but are not generally used for Conservation Banks: Deed restrictions and other restrictive covenants, fee title transfer, multiple party agreements, contractual agreements (and sometimes federal law & regulation although rare)

Conservation Easement Defined

A recorded legal document established to conserve biological resources in perpetuity,** and which requires certain habitat management obligations for the conservation bank lands.

-Guidance for the Establishment, Use, and Operation of Conservation Banks (USFWS 2003)

A voluntary legal agreement between a landowner (grantor) and a land trust (grantee)* that permanently (in perpetuity)** limits uses of the land in order to protect its conservation values.

-<https://www.landtrustalliance.org/what-you-can-do/conservation-your-land/questions>

*Using land trusts as an example. As stated earlier, other entities may be grantees

** Again, depending on state law

Why use a conservation easement?

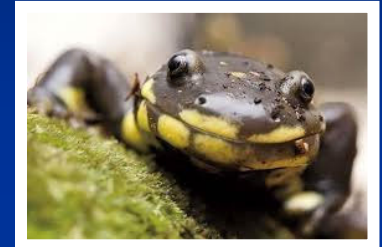
- The Grantee monitors condition of the property
- Grantee may assume management responsibility, but generally the Grantor remains responsible for management
- Grantee has the right to enforce the terms of the easement against the Grantor
- Easement remains valid upon a transfer of the underlying property
- More secure form of protection than other mechanisms (durability)

Problems that may arise

- May be difficult to identify or agree on a grantee
- Grantee doesn't enforce easement terms
- Grantee may not have sufficient funds to monitor & enforce during “lean ” years

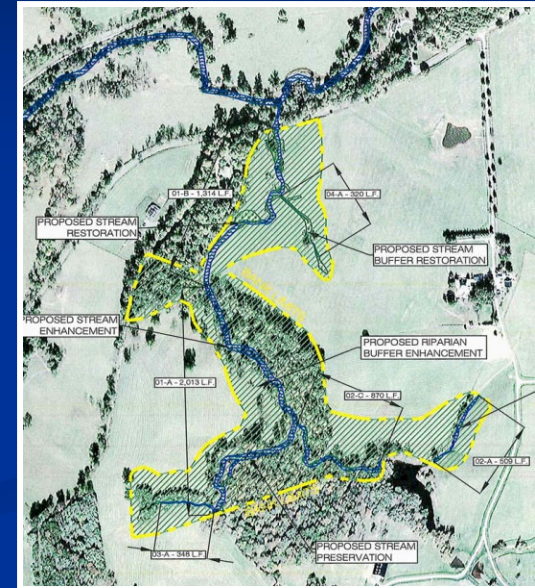
Conservation Easement elements

- Purpose
- Baseline
- Rights & duties of Grantee
- Prohibited uses of land
- Grantor's reserved rights in land
- Enforcement
- Provisions for transfer



Other information related to site protection

- Legal description of property
- Preliminary title report
- Description of biological values
- Phase 1 Environmental Site Assessment



What is durability?

- It's the length of time the protection lasts
- Perpetuity is required in most cases, however...
- State law determines whether perpetuity is available
- Uniform Conservation Easement Act
 - 23 States, D.C., and the U.S. Virgin Islands have enacted some form of the Act

• <https://www.uniformlaws.org/home>

Other mechanisms in brief

Deed restrictions/restrictive covenants

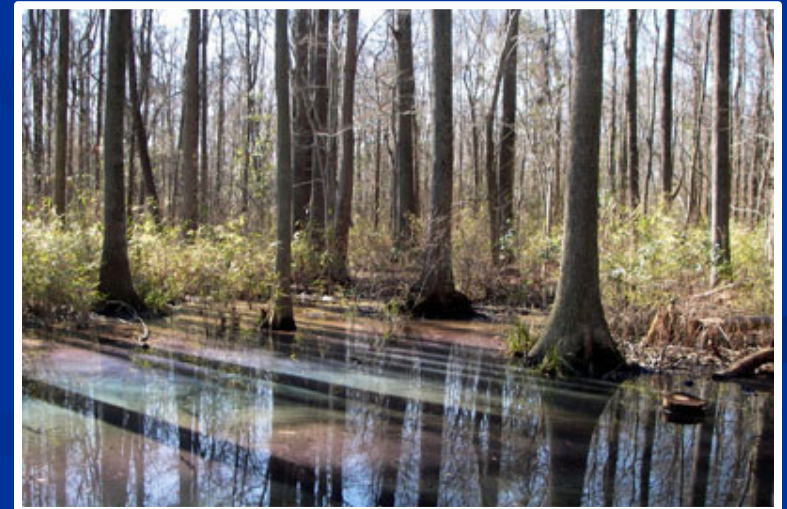
- Limitation on use of the property
- No third party holder (grantee)
- Limitations (restrictions) generally “run with the land”
- More easily removed from land than conservation easements (durability)

Title transfer

- Ownership transferred to a conservation entity to manage & protect the property.
- Generally happens after the bank closure
- May transfer to land management agency (fed, state, local)

Federal land mechanisms in brief

- Federal Facility Management Plans/Planning Designations
- Conservation Land Use Agreements/Cooperative Agreements
- Federal law
- Leases and permits
- Right-of-Way authorizations



Site Selection—Public Lands

- A list of considerations when proposing to site mitigation on public lands:
- Does public land provide the best offset for the impacts anticipated to affect the resources at issue?
- Have funds already been appropriated, or are otherwise expected to be available to the public agency in the foreseeable future, to accomplish the mitigation being proposed within the time frame identified? If yes, this would not be a suitable site.
- Is siting the mitigation on public land consistent with applicable land use plans and any pending plan amendments? If not, would a plan amendment be appropriate?
- Are there any pre-existing valid claims (e.g., mining claim)? Reserved rights? If yes, are they incompatible with the proposed mitigation activities?
- Are there issues with subsurface mineral rights/split estates?

Site Selection—Public Lands (continued)

- Are there Tribal concerns/rights? If so, can these be resolved?
- Are there local government concerns? If so, can these be resolved?
- Are there any competing land use proposals for the site (consider both direct and indirect impacts of proposed projects on or adjacent to the site being considered as mitigation)?
- Are there water rights issues that would preclude a successful/sustainable mitigation project? If so, can these be resolved?
- What degree of degradation exists at the proposed mitigation site? What degree of functional lift can be achieved by the mitigation project? Should be high for both questions.

Site Protection—Public Lands

Site protection instruments available to public land managers depend on the laws and regulations governing the public lands. For example, under the Federal Land Policy and Management Act (FLPMA) the BLM has several potential instruments that have varying degrees of durability:

- Planning designations made through Land Use Plans (LUPs) that provide areas suitable for mitigation projects/activities (e.g., National Conservation Lands and Areas of Critical Environmental Concern) (FLPMA, Title 2)
- Long-term leases that can allow mitigation projects in advance of impacts (FLPMA, Title 3)
- Ability to enter into contracts or cooperative agreements involving the management and protection of public lands (FLPMA, Title 4)
- Right-of-way authorizations for mitigation projects/activities associated with a project (FLPMA, Title 5)

Sustainability

What should be considered before accepting land as conservation property?

- Who owns it?
- Does the owner have good title?
- Who else has an interest in the land?
- Is the land protected already?

How do you find out about other interests in the land?

A preliminary title report can alert you to potential prior existing interests on the property. Examples are:

- Leases, rights of way, other easements
- Mineral rights
- Timber rights
- Lien or mortgage



What should you do if you find prior existing rights?

If possible, try to elevate the site protection mechanism so that it will be given **PRIORITY** over other existing property interests.

HOW?

Subordination agreement with the holders of the prior existing rights.

NOTICE!

The site protection document must contain notification provisions associated with property and easement transfer.



Enforcement

Where practicable, establish in an appropriate third party the right to enforce the protection mechanism, and provide the resources necessary to monitor and enforce the protected sites



Seek Advice of Counsel

- Consider variation in state laws governing real estate
- Adapt instrument to the unique requirements of the site
- Determine whether instrument is legally sufficient and enforceable

Questions?

