
Five Tips to Expedite the Regulatory Review Process for Conservation Easements

Through increased communication and coordination among all entities involved in the compensatory mitigation process, the author provides several tips on securing site protection for conservation easements.

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Site protection instruments run the gamut from real estate instruments to management plans and other mechanisms and vary from state to state.¹ This article will cover five tips for facilitating conservation easement review, although the considerations discussed below may also be applicable to other types of site protection instruments.

If your client is looking to develop property that includes wetlands, it is possible that the project will require a Clean Water Act permit.² The goal of the Clean Water Act's §404 program is to ensure no net loss of wetlands.³ To achieve this, unavoidable impacts to wetlands that are waters of the United States often require compensatory mitigation,⁴ which can be achieved through mitigation banks, in-lieu fee instruments, and permittee responsible mitigation projects.⁵ Whatever form the compensatory mitigation takes, it should be protected through a site protection instrument.⁶

Tip #1

If your client wishes to continue to use the property on which the conservation easement is placed, ensure that the use your client wishes to maintain is included in the reserved rights of the conservation easement. Be prepared to present a reasoned explanation as to why the use is compatible with the purpose of the conservation easement.

Although your client may be amenable to restricting activities on property that is encumbered by a conservation easement, it may be that he or she would like to continue to hunt, fish, etc. Talk to your client to see what activities are important to them to preserve. The more flexible the client can be, the more likely it is that the conservation easement will be acceptable to the regulatory agency. The burden is on the applicant to demonstrate that the activity is consistent with the purposes of the compensatory mitigation project. The regulatory agency will have to support its decision, likely under the "arbitrary and capricious" standard,⁷ so you should be able to provide information that meets or surpasses this criteria. Most of the time, the regulatory agency

will have some flexibility regarding what can or cannot take place. For instance, limited hunting of invasive species (e.g., feral hogs) may actually be a benefit for the underlying purpose of the conservation easement, whereas a larger operation like commercial hunting may not. Work closely with your environmental consultant to ensure that you can support your client's position with objective information.

Tip #2

Conduct a title review on the property that you are going to propose for compensatory mitigation in the planning stages of the permitting process.

The regulatory agency will review the title information to ensure that any encumbrance not consistent with long-term protection of the site is adequately addressed.⁸ For example, it is possible that the regulatory agency will require oil, gas, and mineral (OGM) interests or the rights of entry associated with these interests to be extinguished prior to recording the conservation easement.⁹ This is a potential cost to your client that he or she should be aware of, as it may factor into the financial viability of the project. Accordingly, it is better to identify these issues upfront rather than later in the permitting process. If you have an understanding of what uses are incompatible with the compensatory mitigation site, you can advise your client of the costs and efforts that will be associated with recording a conservation easement on one parcel versus another.

Tip #3

Coordinate closely with the regulatory agency to understand what supporting information the agency will need to review the conservation easement and what issues the agency will be trying to resolve.

Usually, the conservation easement is reviewed in the latter stages of the permitting process and your client will be anxious to move the process along. If you know ahead

of time what the regulatory agency requires to complete its review, you can be proactive by providing the information the regulatory agency requires in an easily digestible manner.

Most regulatory agencies will require a title insurance commitment to ensure that there are no incompatible uses within the conservation easement area; however, a less burdensome title abstract or attorney's opinion may be sufficient. Regardless of form, make sure ahead of time that the legal descriptions in the title review documents match those of the conservation easement.

The determination of what is compatible with the compensatory mitigation project will be unique to each compensatory mitigation project. Providing a copy of the document (e.g., warranty deed, easement, etc.) to the regulatory agency with the title abstract will save the reviewer the time of looking that information up. Additionally, if you identify encumbrances that are not consistent with the compensatory mitigation project, be prepared to explain how they will be addressed. This may preclude the need for the reviewer to ask additional questions about exceptions to the title.

Tip #4

Provide a survey or map of the conservation easement area with the encumbrances depicted on the survey/map.

Especially with linear encumbrances like pipelines or power line easements, understanding where the encumbrances are relative to the environmental features to be protected by the conservation easement can be difficult. By providing a survey with the encumbrances depicted, you can assist the regulatory agency in determining whether they are or are not compatible with the conservation easement.

Tip #5

Offer well-reasoned solutions to outstanding issues uncovered by the title review.

If OGM interests cannot be extinguished due to an unwilling seller, perhaps there is an alternative path forward. For example, the main concern of a regulatory agency with respect to OGM interests may pertain to the impact to the surface of the land under the conservation easement. It may be that the OGM holder would be amenable to payment for extinguishing the right of entry to the surface of the property while maintaining the subsurface rights (through offsite drilling, etc.). The regulatory agency will

likely consider this to be an acceptable alternative to requiring the OGM interest to be extinguished in its entirety.¹⁰ Similarly, as mentioned above, uses that on their face seem incompatible with the purpose of the conservation easement may be demonstrated to be beneficial to the land. A well-thought-out silvicultural plan that utilizes controlled burning and thinning of certain species of trees to achieve a natural hammock may be compatible with the purpose of a conservation easement. By framing your proposed solution as a benefit to the protected resource, you are more likely to be able to achieve your client's goal and meet the regulatory agency's criteria for site protection.

In conclusion, when your client has a project that requires compensatory mitigation, you should coordinate closely with the appropriate reviewing agencies to understand the requirements for a permit to develop the property. Be prepared to explain how any potentially perceived conflicts with the conservation easement are not incongruous with the conservation easement. Provide thorough, well-reasoned, and fact-based analysis, and include supporting information from your environmental consultant. Hopefully, these tips will help you better anticipate and more easily resolve issues regarding conservation easements associated with permits for developing wetlands. ■

DISCLAIMER

The views presented by the author do not necessarily represent the views of the U.S. Army Corps of Engineers, the U.S. Department of the Army, or the U.S. Department of Defense.

ENDNOTES

1. Compensatory Mitigation for Losses of Aquatic Resources, 33 C.F.R. §332.7(a)(1) (2008); Compensatory Mitigation for Losses of Aquatic Resources, 73 Fed. Reg. 19594, 19642 (Apr. 10, 2008).
2. Federal Water Pollution Control Act, 33 U.S.C. §1311(a) (1972).
3. 73 Fed. Reg. at 19594 ("compensatory mitigation is a critical tool in helping the federal government to meet the longstanding national goal of 'no net loss' of wetland acreage and function"); see, e.g., *State Wetland Protection: Status, Trends & Model Approaches* (ENVT. L. INST. 2008), available at http://www.eli.org/sites/default/files/eli-pubs/d18_06.pdf (additionally, many state and local entities also require protection of wetlands).
4. See *id.*; 33 C.F.R. §332.1(b)(3).
5. See 33 C.F.R. §332.3.
6. 33 C.F.R. §332.7.
7. Administrative Procedure Act, 5 U.S.C. §706 (1946).
8. See, e.g., 33 C.F.R. §332.7(a)(2).
9. *Id.*
10. See *Id.*