

PUTTING IT INTO PRACTICE: EASEMENT ENFORCEMENT POLICY GUIDELINES

Part One

The Land Trust Alliance intends this guide, developed by Jessica Jay and adapted and edited for this [Alliance Curriculum] course by and Tammara van Ryn and Leslie Ratley-Beach, to help you develop a violation resolution policy tailored to your land trust. The Alliance strongly encourages you to seek legal advice on your policy before adopting it. Please be thoughtful about this process and don't merely take what is offered without adapting it to your particular circumstances.

The author recognizes that what follows is an exhaustive process. You may find that some or many of the questions are not helpful to your land trust's particular circumstances. Feel free to treat those as appropriate to your situation. You need not answer all the questions in order to develop a policy that works for your land trust, but read them all and give them some thought. You may find that after you develop your first policy and use it for a few years that your experiences will bring you back to revisit it as well as these questions. Perhaps then you may find that more of the questions are relevant to your more mature circumstances. It is difficult to imagine the future and especially the creativity and ingenuity of landowners and their advisors in their requests to adapt their conservation easement to their current economic or life circumstances. You must be prepared to deal with this in a way that complies with the law and upholds the purposes of the conservation easement. These questions are designed by very experienced practitioners who have struggled with many such issues. Our desire is to assist you with the insights we have gained, often with much pain, so that you can avoid our mistakes. It is worth your effort in order to uphold the credibility of your organization.

If you find that the following is too much detail to start with for your land trust, then warm up with the Assessing Your Organization workbook prepared by the Land Trust Alliance. The questions are shorter and less detailed and provide a first step in identifying issues for your land trust to focus on in more detail. Then take a look at the examples of violations policies the author attached to this course. Pick two that seem to fit your land trust and take them apart with your Board. Talk about each provision and what makes it important to *your* land trust. Ask what is missing for *your* land trust, then develop a draft policy. You may find some of the questions below are more relevant and helpful after that exercise.

Part One is an outline of a violation resolution policy with a worksheet of important questions for your land trust to consider and answer. The Land Trust Alliance designed the questions to help you think through issues you may face when confronted by a conservation easement violation. Effective violations policies will reflect the mission and core values of your land trust and will be unique to your land trust.

Part Two is a template that you can use to create your own draft violation resolution policy. Fill in the blanks using your answers to the questions in Part I. You may also look to the sample provisions provided for your guidance as well. The Land Trust Alliance strongly encourages you to refrain from wholesale copying of the sample language without due consideration of the issues raised by the questions in Part I.

OUTLINE, QUESTIONS, AND WORKSHEET

PHILOSOPHY, MISSION, OR STATEMENT OF INTENT

Your violation resolution policy should begin with a statement of intent or the principles you rely on in enforcing your conservation easements. This section is important because your land trust's policy on violations must be in line with your mission and philosophy regarding your conservation easements and possible violations. All of your decisions regarding violation resolution will follow from this crucial section. To craft a philosophy or statement of intent, answer the following questions using your land trust's mission statement and other documents to guide your responses. If you have not taken the Land Trust Alliance course on Mission, Planning, and Capacity by Jean Hocker, please do so before you complete this section.

As you complete these questions, you'll find it very helpful later if you keep your answers simple and succinct.

A. Organizational Mission How will your approach to enforcing conservation easements incorporate your broader organizational goals and your organization's conservation purpose and mission as represented to the IRS and its purpose, goals, or mission stated within its articles of incorporation?

B. Capacity

1. What financial and human capacity does your land trust have to enforce conservation easements? Do you have full-time, paid staff or volunteer members who would be responsible for enforcing conservation easements held by the land trust? What is their background, experience and skills? Do you have pro bono legal assistance, outside counsel, or in-house counsel?
2. Does your land trust already have funds dedicated to monitoring, stewarding, and enforcing easements? If not, how does your land trust plan to raise and manage the financial and human capital required to enforce conservation easements? Do you have a separate legal defense fund?
3. How will your land trust train its staff and board in violation resolution? How will your land trust foster and maintain a positive relationship with landowners and educate landowners about enforcement issues?

C. Philosophy of Enforcement

1. Does your land trust plan to enforce the conservation easements it holds consistent with express or implied intentions of the conservation easement grantor (the spirit of the conservation easement), or strict interpretation of the purpose and terms of the conservation easement, or both? What if the intent varies from the language of the easement?
2. How will your land trust triage the resource damage if any of violations? Will you consider the degree of damage to protected conservation values, whether damage is ongoing, and whether conservation values can be restored or remediated? How do you plan to ensure that the enforcement response is proportionate to the damage?
3. Will your land trust distinguish between technical violations (e.g., failure to give notice) and violations with conservation resource impacts (e.g., construction of an unauthorized barn) and if so how or if not, why not.
4. Will the land trust enforce every violation of an easement, technical or not? If so, how do you plan to triage severity and address proportionate response to the violation?
5. How will legal precedent of your land trust's enforcement weigh in your land trust's decision to enforce and methods by which it enforces?

D. Public Perception and Landowner Relationships

1. How does public perception of your land trust and its enforcement of conservation easements influence your decision to enforce violations of your conservation easements? To what degree will your decision to enforce and method of enforcement be influenced by the public's perception?
2. What role does your land trust's relationship with the landowner or violator play in enforcement? Does your land trust's response to violations and enforcement of conservation easements vary depending on who violates the easement—first generation landowner, subsequent landowner, third party?
3. How will your land trust's knowledge of the person violating the easement and their explanation for the violation affect your response? Will your response to an innocent mistake be different than a response to a deliberate, knowing violation? How will your land trust maintain a positive relationship with your landowners?
4. How will your land trust maintain public, donor, and member confidence in your land trust and land conservation generally through its enforcement decisions or process?

DISCOVERING AND ASSESSING THE NATURE AND EXTENT OF THE VIOLATION

When confronted by a possible violation of an express provision of a conservation easement, your land trust must take a number of steps to confirm that a violation exists, that it is a violation of an express provision of the conservation easement, assess the severity of the violation and confirm that your land trust is appropriately interpreting the conservation easement and has identified all the resource, legal and landowner issues in order to

determine the appropriate response. You must gauge the level of effort required to bring the land back into compliance with the conservation easement. You must also set expectations for remediation and restoration if appropriate. If the violation is major, then your land trust will put more financial and human resources to resolve the issue than may be the case for minor violations. The following questions will help you come up with a process for approaching violations.

A. Discovering Violations

1. What system is the land trust able to implement to assure timely discovery of and response to violations? Does your land trust maintain baseline documentation reports? Will easements be monitored annually in person, on foot, by vehicle, or aerially?
2. How will your land trust verify the violation and its cause if the same were discovered by a non-land trust staff or member between annual monitoring visits? How will your land trust gain access the property--pursuant to an emergency or standard access provision in the conservation easement to assess the violation?
3. How will your land trust determine who violated the easement? How will the land trust contact the violator? How and when will your land trust report the violation to the landowner--immediately after learning of the violation or after your trust has assessed the violation and determined the extent of damage and whether or not the damage is on-going? How will your land trust correspond with the violator in a manner such that the trust knows its communications are being received by the violator?

This template contains four levels of violations so that your land trust can consider all the available levels and select those that it feels are most appropriate for your land trust. It is your land trust's decision about how many levels of violations to have and how to define those levels. The author chose to be all inclusive in asking questions about all 4 levels so that each land trust may fully evaluate its options.

B. Defining Technical Violations

1. Is the violation a "technical" or "paper" violation with no impact upon or consequence to the conservation easement's purpose or protected conservation values and resources?
2. Does the violation not impact resources central to the conservation purposes of the conservation easement?
3. Would the activity or action be permitted under your trust's current model easement?
4. Examples of "technical" violations:
 - Failure to give notice of an approved use which use had no tangible, physical impact on the protected property;
 - Sale or transfer of the conserved land without providing notice, which sale or transfer had no tangible physical impact on the property;
 - Discovery of a pre-existing condition upon the property.

C. Defining Minor Violations

Is the violation a "minor" violation with nominal impact upon or consequence to the conservation easement's purpose or protected conservation values or resources but slightly more than no impact? Is the impact transitory?

D. Defining Moderate Violations

Does the violation have a moderate physical impact on those resources protected by the conservation easement?

E. Defining Major Violations

Does the violation have a significant impact on those resources protected by the conservation easement?

F. For all levels of Violations to determine severity

1. Are the impacted resources central to the conservation purposes of the conservation easement?

2. What is the physical impact of the violation? How much/how large of an area of the protected property is affected?
3. How significant is the impact? How easy it to fix? Does it involve soil loss, water quality, scenic attributes or other resources protected by the easement? If so how much? How difficult to correct?
4. Are there legal implications of the violation or will enforcing the violation set legal precedent?
5. What public perception issues exist? How serious? How much time and resources to address?

DETERMINING RESPONSES TO VIOLATIONS

Once your land trust has defined the extent, magnitude, and severity of the violation, you must then determine the appropriate response to the violation. Your response will depend upon the nature, scope, and impact of the violation and how the violation relates to your land trust's mission, the conservation values and resources protected by the conservation easement, and public perception of the violation and your land trust's management of the same. Your land trust should put into action a plan for responding to violations based on your land trust's capacity, its mission, and the impact and severity of the violation. This plan may set time-frames for action by your land trust, the landowner, and/or the landowner, taking into consideration the magnitude of the violation and your land trust's size, training, and capacity. For example, a staffed land trust's approach and response times may vary greatly from that of an all-volunteer land trust that has more limited capacity, training, and time to devote to enforcement, but that notwithstanding, the plan of action should strive to respond in a manner appropriate to the severity of the violation.

A. Determining Response to Violation

1. Is the violation a "clear" violation of an express provision of the conservation easement? Is the easement language ambiguous? Is the easement silent on the issue?
2. Is the violation precedent setting?
3. Is the violation seemingly intentional or accidental? Is the violation a repeat of a prior, resolved violation?
4. Will your land trust's response be proportionate to the level of violation (technical/minor/moderate/major)? Does the conservation easement provide guidance as to your land trust's response?
5. How will your land trust gauge when to use litigation or equitable legal options such as an injunction in urgent enforcement situations, such as when you need immediate access to the property or to halt further damage to the conservation values or property? Will the availability or affordability of legal counsel influence your decision to and how to enforce? If legal action is appropriate, what are the landowner's potential defenses and how strong are they?
6. How will the identity of the person involved with the violation (landowner, successor generation landowner, unrelated third party) affect your land trust's response to the violation? How will the action your land trust takes change if the violation is the result of trespass or neighbor's actions?
7. Are there other alternatives for resolution of the violation such as negotiation, collaboration, or mediation? Will written warning, written acknowledgment, discretionary approval, amendment, or pre-litigation settlement be available or appropriate?
8. If there are there any back-up enforcers, co-holders, or third party enforcers identified in the conservation easement or available by state law requiring notice and consultation, how will the existence of these back-up enforcers or co-holders change your land trust's enforcement response or responsibility to enforce?
9. Will your land trust attempt an informal, voluntary, collaborative discussion with the landowner regarding the violation and its resolution? Is telephone contact with the landowner sufficient, or should phone calls be followed by a letter reiterating any oral communication? Does telephone or other verbal contact with the landowner keep informal avenues of discussion and negotiation open? Does formal correspondence, like a

letter, close these informal avenues? If so, will your land trust consider adding provisions to the land trust policy or procedure or conservation easement to permit first contact or notice that is unwritten?

10. If an informal approach fails, will your land trust attempt a more formal process involving written notices to the landowner describing required restoration and compliance deadlines? Does the language of the conservation easement provide guidance on the issue?

INTERNAL LAND TRUST NOTICE

The land trust must engage in certain internal discussions, notification, and evaluation of the facts and circumstances surrounding the violation.

A. Providing Internal Notice of Violations

1. When will your land trust review its enforcement policy, the conservation easement, the baseline inventory, and the most recent monitoring reports for the property? How will review of the policy and conservation easement provide guidance as to the extent/type of violation (minor/moderate/major) and procedures to take regarding the type of violation?
2. If there are there any back-up enforcers, co-holders, or third party enforcers identified in the conservation easement or available by state law or statute requiring notice and consultation, who will give such notice and by when? What will be their role and how will that be determined?
3. Who will report and describe potential violations to whom and by when? A designated staff or volunteer person, a subcommittee of the Board of Directors, the President of the Board, or the Executive Director? Does the severity of the violation change the notice procedure?
4. When should the land trust alert its legal counsel of a potential violation? If discovery of the violation is after the fact, at what point will evaluation and formulation of resolution and remedies include the land trust board and legal counsel? Does the severity of the violation change the notice procedure?

DOCUMENTING THE VIOLATION

A thorough and accurate record of the violation is essential should the land trust need to present evidence of the violation. The violation should be carefully documented for an audience that is unfamiliar with the property. The land trust should have a plan for how it will document a suspected violation. Your land trust together with legal counsel needs to decide to what extent to document for each level of violation and how to gauge landowner responsiveness.

A. Documentation of a Violation

1. How will your land trust determine what level of documentation is appropriate for each violation level of severity that you articulate in your policy? What does legal counsel suggest?
2. Do all reported violations require a site visit for assessment or inspection for compliance, or do only the more extensive violations require assessment and inspection of the violation and compliance?
3. How will an opportunity be created for your land trust to take photographs or videotape with commentary of the violation that can be keyed to a photo map of the subject property and signed and dated by the photographer? How will an opportunity be created to make measurements of damage to the affected resource, such as by counting resources damaged, taking diameters to calculate size, including ruler or other items for scale in photos, and mapping position and location of violation?
4. How will your land trust compare the condition of the property or conservation values after the violation to the baseline inventory data, assessment, and photo-documentation of the property and conservation values prior to the violation? Will your land trust require signed and dated field notes or monitoring reports documenting the violation? Should any inspection include documentation of the site conditions and a written report?

5. How will the land trust maintain and save written documentation of the sequence and details of events as they happen and continue to evolve, including correspondence, notes, or records of conversations related to the violation, and summarize meetings, decisions, or agreements relating to the violation? Will your land trust need to consult with legal counsel to understand how best to document and create a record of the violation?

ADDRESSING THE VIOLATION

A. Responding to a Violation

1. How will your land trust proceed if the violation itself is in dispute, and your land trust and the landowner disagree as to whether or not a use or activity violates the easement? What formal or informal methods to resolve this disagreement should your land trust pursue? Who pursues them?
2. What if the violation was caused by a third party trespasser or neighbor and not the landowner? Is the land owner still responsible for the violation? What does the conservation easement say? Can the land owner and land trust work together or must your land trust sue the land owner over or to correct the violation? What does your state law say about standing of the land trust to sue the third party directly with or without the landowner?
3. When does the land trust seek a temporary court order to enjoin the landowner's future or current activities? Will the conservation easement or policy document provide any guidance here? Is litigation or injunction ever to be considered an option of first, instead of last, resort? When will the land trust ask for monetary damages in addition to or in lieu of corrective action or remediation?
4. If the landowner complies with requested actions such as restoration, or remediation, what steps should your land trust take to acknowledge such compliance and remediation, and what steps if requested corrective actions have not been implemented or the property not remediated? When should the land trust create or extend a deadline for compliance, or begin legal action?
5. How will your land trust communicate with the landowner? When is correspondence/communication with the landowner best made by your land trust directly and when by its legal counsel? What is the role of volunteers, staff and board members?
6. How will your land trust incorporate landowner education into its process of dealing with violations to prevent future violations?

POST-ENFORCEMENT ASSESSMENT AND EDUCATION

The land trust and landowners should learn and grow from experiencing violations.

A. Assisting with post-enforcement assessment and education

1. How would your land trust have handled the violation differently in terms of managing public perception, landowner relationships and education, and resolution of the violation with the knowledge it now possesses after the violation? Is the landowner available to provide feedback about the violation correction process, if the process was collaborative or informal? Does the land trust have a database or other record retention and distribution system for the violation and enforcement information gained to be applied to future land trust actions?
2. How would revising language in your land trust's model easement assist to identify, address, or prevent the type of violation that occurred? How would differently evaluating the proposed easement transaction before your land trust accepted it create a situation where your land trust might have rejected the easement?
3. Would your land trust's contact and communication with or education of the landowner have avoided or more quickly resolved the violation? If yes, was education and contact part of your land trust's policy?
4. Did your land trust have adequate capacity and funds to manage the cost of the violation or would some adjustment to the endowment for enforcement be appropriate?

5. Would involving legal counsel earlier or later in the process have changed, complicated, or resolved the violation enforcement problem earlier? Did involving legal counsel escalate the enforcement of the violation and create more difficulty in resolving the violation? Would keeping legal counsel out of the process have benefited or encouraged resolution of the violation? If your land trust had not already notified the Alliance of a moderate or major violation, did it notify the Alliance post-violation of its resolution?
6. How and when will your land trust create opportunities to review and update its philosophy, statement of intent, and overall enforcement approach and policy? Will your land trust resolve to review and update its philosophy and policy after each violation and enforcement event, or no less than every five years, whichever is first to occur?

Part Two

VIOLATION AND ENFORCEMENT POLICY TEMPLATE

Below is a Template for a violation and enforcement policy based on the answers your land trust provided to the questions in the “Outline, Questions and Sample Language” above. Any policy developed by your land trust should be reviewed by legal counsel.

I. PHILOSOPHY OR STATEMENT OF INTENT

The _____ land trust must, as a holder of conservation easements, enforce the legal agreements for which it is responsible.

Sample Provisions

To guide your policy drafting, The Land Trust Alliance provides following sample clauses as examples of land trust mission, purpose, and statements of intent:

Sample 1.

As a holder of conservation easements, _____ Land Trust must enforce the terms of these legal agreements. In addition to protecting the conservation value of the subject property, enforcement is needed to generate public confidence in Land Trust’s mission to conserve open space, to uphold Land Trust’s legal authority to enforce the terms of its conservation easements, and to maintain Land Trust’s ability to accept future donations of conservation easements and its tax-exempt status. Land Trust’s failure to enforce the terms of its conservation easements could jeopardize its 501(c)(3) status if it were shown that Land Trust relinquished its enforcement rights to benefit private individuals. Land Trust’s response to a violation should match the severity of the violation. Minor or technical infractions (i.e., failure to provide notice, litter, minor cutting of vegetation) may warrant a written acknowledgement of the violation from Land Trust’s designated staff or volunteer to the landowner. More egregious transgressions (i.e., construction, excavation outside permitted building areas) require a swift and formal response.

Purpose. Land Trust is responsible for enforcing all its conservation easements through identification and rectification of violations. Regular communication and property monitoring result in violations being found and corrected in a timely manner.

Enforcement. Enforcement is needed to: Engender public confidence in Land Trust and its easement program, which public confidence in Land Trust’s commitment to stand by its easements is built with each easement; maintain Land Trust’s legal authority to enforce easement held as delayed enforcement of a violation may jeopardize Land Trust’s right to enforce particular provisions; and maintain Land Trust’s ability to accept tax-deductible easement gifts and its tax-exempt status, as federal regulations specify that the eligibility of an organization to accept tax-deductible easement gifts must “have a commitment to protect the conservation purposes of the donation, and have the resources to enforce the restrictions”.

Sample 2:

Philosophy. _____ Land Trust recognizes that landowner education and relationship-building not litigation are the best immediate and long-term methods to guarantee that conservation easements are upheld. Land Trust works with owners of conserved land to help them understand their conservation easement and continue to be good stewards of their land. Land Trust uses this philosophy to determine what is a violation of a conservation

easement and what is the appropriate response to that violation, we apply the following principles and considerations. Land Trust also promptly and diligently pursues violations to assure integrity of the conservation easements that we hold.

Application. There is a continuum of responses to violations. Land Trust elects the response based on the combination of the resource impact of the violation and the mitigating circumstances present. This results in a dynamic among all these factors that makes each response unique and individual for each landowner's circumstances.

Analysis of Sample Policies

The two above samples contrast the two ends of the philosophical spectrum: enforcement and relationships. Sample 1 focuses on enforcement and legal approaches. Sample 2 focuses on landowner relationships and trust as the primary approach to stewardship. You also might review the following sample policies in the attachments to compare and contrast some additional approaches. For example, the Columbia Land Conservancy policy and philosophy is a blend of both legal enforcement and landowner relationships, rather than focusing exclusively on one or the other. The Massachusetts Easement Defense Enforcement Policy and the Dutchess Land Conservancy policy philosophies appear to approach enforcement more from the land trust perspective of preserving resource values and complying with IRS regulations. All these approaches are legitimate. Your land trust needs to determine what is appropriate for your area. You could also blend all the approaches as well but that leaves the people implementing with less clear direction about what is the priority perspective to take when making difficult judgment calls.

II. DISCOVERING AND ASSESSING THE NATURE AND EXTENT OF THE VIOLATION

The _____ land trust shall determine whether, where, and when a violation occurred [within _____ days upon learning of the violation].

The _____ land trust shall determine the extent of violation to assist decision-making along the way, gauge level of effort required and level of expectations for remediation and compensation. If it is major, then land trust will put more financial and human resources into attempting to resolve the issue than may be the case for minor violations) by making the following considerations:

A "technical" violation is defined as _____ and shall create the following potential responses:
_____.

A "minor" violation is defined as _____ and shall create the following potential responses:
_____.

A "moderate" violation is defined as _____ and shall create the following potential responses:
_____.

A "major" violation is defined as _____ and shall create the following potential responses:
_____.

Sample Provisions

Sample 1.

Technical violations are "paperwork deficiencies", such as failure to give notice of a sale of the conserved land, that have no tangible physical impact. These issues are not central to the conservation purposes of the conservation easement.

Minor violations have only a transitory or nominal resource impact such as an old trash dump that is no longer used and has no evidence of hazardous materials. These violations are not central to the conservation purposes of the conservation easement.

Moderate Violations: Moderate violations have a substantial physical impact on those resources protected by the conservation easement and are central to the conservation purposes of the conservation easement, for example extensive tree cutting in a buffer or locating a large mixed use agricultural and commercial structure in an area that has a negative effect on the farm. The factors considered are distance outside the complex, extent of the mixed use,

size of the structure, and amount of rated agricultural soils affected, and seriousness of the negative impact, as well as the landowner intent.

Major Violations: Major violations have a significant resource impact on those resources protected by the conservation easement and are central to the conservation purposes of the conservation easement. For example, a 100-acre timber cut on a 1000-acre forestland easement property in violation of an approved harvest plan, construction of prohibited structures, or any commercial surface mining.

Determining Level of Violation: To determine the level of violation, the following questions and criteria may be helpful: What is the physical impact and how central is the damaged resource to the conservation purposes?

CRITERIA (Scaled low to high)

- i. How central to conservation purposes, conservation values, or core resource values protected by the easement?
- ii. How much/how large or an area of the protected property is affected?
- iii. How significant is the impact? How easy to fix? Does it involve soil loss, water quality, scenic attributes or other resources?
- iv. Would the activity or action be permitted under our current form of easement?

Analysis of Sample Policies

This sample shows all four violation levels. For another version of a policy with four violation levels you can also look at the Mountain Conservation Trust of Georgia procedures. MCTG uses different terminology and triage than the above example and has a useful list of questions to ask to determine severity. In contrast, some policies do not define violation levels at all leaving it to be determined at the occurrence. This is a legitimate approach and is demonstrated in the Sudbury Valley, Teton Regional and Marin Agricultural Land Trust policies. One dilemma is that as the land trust grows and staff and volunteers change, continuity about what constitutes a violation and how to triage those violations is lost. This may result in landowner discontent about being treated differently in similar circumstances. Some general guidance about triage may be advisable. The Columbia Land Conservancy policy is an example of a three tiered violation triage system. Gallatin Valley Land Trust is an example of a two tiered violation triage system (minor and major).

III. DETERMINING RESPONSES TO VIOLATIONS

The _____ land trust will evaluate the extent and nature of the violation and explores potential corrective actions with _____ or other designated staff or volunteer [and legal counsel], develops [suggestions for restoration, remediation, and/or damages or compensation] by the landowner, and formulates recommendations [for corrective action] [and a timeline for compliance].

If violation is minor or technical in nature, evaluate potential for a discretionary approval or notice the landowner to resolve this violation and prevent future violations. Adhere to _____ discretionary approval policies or procedures.

Sample Provisions

Sample 1.

After discovering the potential violation, Land Trust’s designated staff or volunteer shall review the conservation easement document. If the designated staff or volunteer concludes the action to be a “major violation” (defined hereafter) of the easement’s terms and pursuant to this Land Trust Policy, and the violation is on-going, the designated staff or volunteer shall immediately involve Land Trust’s Land Committee. If the designated staff or volunteer concludes the action to be a “minor” or “moderate” violation (defined hereafter), the designated staff or volunteer shall attempt to resolve the matter without involving Land Trust’s Land Committee.

Major easement violations are reported to Land Trust’s Board of Directors as soon as they are identified. Legal counsel is brought in early but at the appropriate time. The appropriate time is determined by the Board President, Executive Director and Stewardship Director or Committee Chair. Legal counsel may be especially useful to negotiate adequate reparation when complete restoration is impossible. Land Trust staff, volunteers and board working on the violation are briefed by an attorney on proper procedures, conduct, correspondence, and other communication to protect the trust’s legal interest. If responsible for the violation, the landowner (if not present

during visit) is contacted as soon as a violation is identified by Land Trust. A meeting is set up to discuss the violation and its remediation. A written record of all meetings, correspondence and other forms of communication is essential when working with the landowner toward resolution. If a third party, such as an adjacent landowner is responsible for the violation, they are contacted immediately by Land Trust to schedule a meeting to discuss the violation and its remedy. The landowner must be invited to such meeting since legal responsibility for the violation ultimately falls on her/him.

Land Trust's designated staff or volunteer shall evaluate the violation and formulate the required remedies pursuant to this Land Trust Policy. If discovery of a major or moderate violation is after the fact, evaluation and formulation of remedies will include consultation with the Board and appropriate committees. If the violation is ongoing and response time is of the essence, the designated staff or volunteer will consult with the chairperson of the Land Committee and the President of the Board. Designated staff or volunteer shall contact the landowner by telephone, explain the situation, and Land Trust's Policy on easement violations. The Land Trust must request correction of the violation, replacement and/or cessation of the activity, and deadline for compliance. If a third-party caused the violation, arrange a meeting with all parties, being sure to include the landowner. Even if the landowner did not cause the violation, the landowner may still be held legally responsible depending upon the precise language of the easement. The third party should be held responsible for remediation to the extent possible.

Sample 2.

Land Trust evaluates moderate and major violations and potential corrections and actions with Executive Director, appropriate staff or volunteers, and legal counsel pursuant to this Policy, develops alternative suggestions for remediation or compensation by the landowner, and formulates recommendations for corrective action and deadline for compliance.

Litigation and Alternative Dispute Resolution: require land trust examination to be certain there are adequate funds to cover legal expenses, hire and prepare the best legal counsel it can find, actively participate in the formulation of the case, use the land trust's careful documentation of the violation, baseline, and monitoring documentation and experience on the property to its fullest advantage.

Legal counsel should be brought in early but at the appropriate time pursuant to this Policy for moderate and major violations. The appropriate time is determined by the Board President, Executive Director and Stewardship Director or Committee Chair. Legal counsel may be especially useful to negotiate adequate reparation when complete restoration is impossible. Land trust with legal counsel should decide the best course of action regarding litigation or mediation.

Sample 3.

Approval/Amendment: Consider the use of an amendment or a discretionary approval (similar to amendment but not signed by landowner) to resolve the violation. Follow land trust amendment or discretionary approval policies or procedures.

Analysis of Sample Policies

Samples 1 and 2 above show different levels of detail and direction to volunteers and staff regarding the various roles of land trust board members, staff, volunteers and legal counsel. Sample 1 is more detailed and chronological. Sample 2 is more of an overview and more staff directed. Both involve legal counsel early. Sample 3 addresses only the use of amendments to resolve violations, which is an important concept to include in addition to the roles of the various parties. Teton Regional Land Trust uses a different approach in its policy to lay out the various methods of resolution and the order in which TRLT chooses to use them. Gallatin Valley Land Trust combines its violation triage with a numbered step process of who to contact in which order. You will note the differences in process between their minor and major violation designations. For a visual depiction of a notice process, see the Vermont Land Trust violation resolution schematic.

IV. INTERNAL LAND TRUST NOTICE

The _____ land trust [staff, volunteers, committee] shall evaluate the violation and formulate an appropriate response [to propose to the Board] after determination of the extent of the violation and whether it is ongoing or not. The [staff, executive director, committee] shall educate/inform the [Board of Directors/President of the

Board/Executive Director] of the violation and upon a full vote of the [Board/consideration by the Stewardship Committee/determination of the Executive Director], the _____ land trust shall decide how much [time, money, resources] to allot to the landowner to correct the violation.

Sample Provisions

Sample 1.

After discovering the potential violation, Land Trust's designated staff or volunteer shall review the conservation easement document. If the designated staff or volunteer concludes the action to be a major violation of the easement's terms and the violation is on-going, the designated staff or volunteer shall immediately follow this Land Trust Policy to involve Land Trust's Land Committee (or other appropriate committee pursuant to this Policy). Land Trust's designated staff or volunteer shall evaluate the violation and formulate the required remedies. If discovery of the violation is after the fact, evaluation and formulation of remedies will include consultation with the Board. If the violation is on-going and response time is of the essence, the designated staff or volunteer will consult with the chairperson of the Land Committee and the President of the Board.

Sample 2.

Major and moderate easement violations are reported to Board of Directors as soon as they are identified. Legal counsel is brought in early but at the appropriate time. The appropriate time is determined by the Board President, Executive Director and Stewardship Director or Committee Chair. Legal counsel may be especially useful to negotiate adequate reparation when complete restoration is impossible. Land Trust staff, volunteers and board working on the violation are briefed by an attorney on proper procedures, conduct, correspondence, and other communication to protect the trust's legal interest. Minor easement violations are reported to Board of Directors at its regular meetings pursuant to this Policy to identify action, progress, and resolution of violation(s).

Sample 3.

Land Trust Evaluation of Easement, Baseline Inventory, Monitoring Reports: Following discovery of a potential violation, the land trust shall review the conservation easement document encumbering the property, the baseline inventory for the property, and the most recent monitoring report for the property; Review conservation easement to determine violation type (minor/major) or if easement provides no guidance, the resources damaged; Compare baseline inventory to recent documentation or monitoring report; and Compare most recent monitoring report to recent documentation.

Land Trust Evaluation of Timing of Violation: If discovery of the violation is after the fact, evaluation and formulation of remedies will include consultation with the land trust board and legal counsel and if after the fact/irreversible; requiring compensation and/or reclamation; If the violation is on-going and response time is of the essence, the land trust will consult with the board and legal counsel and if on-going; requiring cease/desist and restore order; If the violation is before the fact/preventable/reversible; requiring review and analysis.

Land Trust Notification: Report and describe potential violation to designated staff or volunteer member; or Report and describe potential violation to Board of Directors; or Hold staff or volunteer meeting to report and describe potential violation to Executive Director and Stewardship Director.

Land Trust Legal Counsel and the Land Trust Alliance Notification: Alert legal counsel to potential easement violation early (work closely and early with legal counsel to understand importance of policies, procedures, conduct, and correspondence in resolving violation); and Inform the Land Trust Alliance of easement violation when violation is confirmed. (This is especially important if the violation might require litigation and/or set a national precedent).

Analysis of Sample Policies

These three samples address the process for evaluation of the land trust documents and communication of the evaluation results to the Board based on staff or volunteer triage of severity. You will note that some land trusts only report major violations, others report all. This depends on your land trust size, capacity, composition, violation frequency and risk analysis. What is most important is to have a policy that is effective for your land trust that you follow consistently. Sudbury Valley Land Trust breaks its evaluate and response into urgent and non-urgent

matters in contrast. Marin Agricultural Land Trust has a detailed comprehensive step by step evaluation and response system that it applies to all violations regardless of triage.

V. DOCUMENTING THE VIOLATION

The _____ land trust shall document the violation using appropriate available technologies. Documentation shall continue throughout the violation process until the violation is resolved _____ and after the violation _____.

Sample Provisions

Sample 1.

The first response to a violation is a thorough and accurate record of the violation proportionate to the magnitude of impact on the easement's conservation values and whether the violation is technical, minor, moderate, or major (as defined hereafter). Documentation should be written for an audience that is unfamiliar with the property. The violation should be carefully documented quantitatively and descriptively. The record should include Photos, signed by the photographer and keyed to photo points on a map, or a videotape with verbal commentary. The violation record provides measurements of damage to the affected resources specifically protected by the conservation easement. The violation record includes proportionately appropriate field notes that are dated. The violation record includes explicit comparison with the baseline assessment and photo-documentation.

Sample 2.

Document the violation with photographs (photographs should be keyed to a photo map of the subject property and each should be signed and dated by the photographer), measurements of damage to the affected resource, signed and dated field notes, and explicit comparison with the baseline data. A thorough record will be essential should Land Trust need to go to court. The violation should be carefully documented for an audience that is unfamiliar with the property. Records should be adequate to demonstrate the chain of events to a court, should litigation later become necessary.

Sample 3.

A thorough and accurate record of the potential major violation is essential should the land trust need to present evidence of the major violation. The potential major violation should be carefully documented for an audience that is unfamiliar with the property.

Document the Potential Major Violation with:

1. Photographs (photographs should be keyed to a photo map of the subject property and each should be signed and dated by the photographer)
2. Videotape with verbal commentary;
3. Measurements of damage to the affected resource (by counting resources damaged, taking diameters to calculate size, include ruler or item for scale in photos, map position and location of violation);
4. Signed and dated field notes or monitoring report; and
5. Explicit comparison with the baseline inventory data, assessment, and photo-documentation.

Determine If and Who Violated:

1. If land trust staff or volunteer is on site with the owner when a violation is discovered or suspected, politely ask for further clarification of the activity or physical modification and who is responsible for the activity or modification.
2. Continue observation and routine monitoring documentation with photographs and visual observation of property.
3. Do not state definitively or pass judgment as to whether there is or is not a violation.

Documentation Throughout Major Violation Resolution:

1. Keep written documentation of the sequence and details of events as they happen;
2. Write memo to file to summarizing meetings, decisions, or agreements, if not otherwise memorialized; and
3. Keep copies of all correspondence related to violation.

Analysis of Sample Policies

All three of these samples approach documentation similarly with photos and a written description keyed to a map. What is interesting is to what level of violation each applies the process. Sample 3 applies only to major violations on the theory that these are the ones likely to be litigated and provides a very detailed list of steps. Sample 2 applies to all violations and is more general and does not distinguish among violation severity. Sample 1 applies to all violations but is designed to be proportionate to violation severity so that minor violations are documented less than major violations. For another example of a general documentation clause, see the Columbia Land Conservancy and the Dutchess Land Conservancy samples.

VI. ADDRESSING THE VIOLATION

As part of the response to the major/moderate/minor/technical violation, the _____ land trust shall communicate with the landowner in the following manner to pursue the following response, which response includes/does not include inspection of the property _____.

Sample Provisions

Sample 1.

Minor: For all technical and minor violations regardless of degree of mitigating circumstances, Land Trust to pursue landowner education and relationship building. Some technical and minor violations have little response, for example the failure to give notice of an approved activity or of the sale of the conserved land, which response would be approved on principle or waived because of minimal or minor nature and does not require an amendment to resolve, but a friendly letter to the owner acknowledging the minor violation would properly document that it occurred.

Moderate: For all moderate violations regardless of degree of mitigating circumstances, Land Trust to pursue landowner education and relationship building with problem solving and payment of costs as needed. These types of violations usually require one or more site visits to assess the situation and develop a solution. The solution can involve an amendment, approval, or other adjustment and should be consistent with Land Trust policies for amendment, revision, and termination of easements.

Major: For all major violations, Land Trust notice of violation to landowner (contact via telephone or personal visit) to discuss the easement violation, request to halt the activity, and return the site to its prior condition if the landowner has not been responsive to cooperative efforts. (Moderate to major violations will involve other forms of mitigation to correct including restoration where feasible or payment of damages as appropriate to the level of mitigating circumstances). If the landowner can not be contacted by telephone, draft and send a certified letter (return receipt requested) that specifies the violation, reiterate oral explanations and requests (i.e., why a violation, corrective measures required, deadline for compliance), offer of assistance; need for compliance inspection, and requests a personal meeting to resolve the situation. A copy of the certified letter should also be sent by first class mail. Specify a time frame for contact in the letter. If the certified letter is rejected, resend the letter certified, first class, and have it delivered by constable, sheriff, or appropriate authority. Land Trust should seek temporary court order to prevent immediate, irreparable harm if the landowner will not halt the activity after land trust's verbal or written request to do so.

Litigation: If the violation is severe or significant enough, court action or litigation could be the first response or if there is major irreparable damage to a resource that is central to a conservation purpose—for example a 100-acre timber cut in violation of an approved harvest plan. If a response is not received in the time period identified, try to visit the property at times when someone may be there and attempt to make contact. If there is no success with repeated attempts at contact and it is a major violation, consider litigation. (from easement language) If the landowner will not cooperate and other alternatives have not worked, institute suits to enjoin any breach or enforce any covenant by ex parte, temporary, and permanent injunction either prohibitive or mandatory, and to recover any damages from injury to any conservation values protected by the conservation easement, including damages for the loss of scenic, aesthetic, environmental values and remedies shall be cumulative and shall be in addition to any other rights and remedies available to land trust at law or equity.

Sample 2.

Land Trust to contact the landowner by telephone or personal visit to confirm and explain the violation and required corrective action, if necessary. State deadline (X days) for compliance and date for inspection. Immediately follow up the phone call with a letter that reiterates the oral communication. Send a copy to Board and

legal counsel. Inspect the site at the deadline date. Document site conditions with photographs and written report. If the landowner implemented the corrective actions, send the landowner a thank-you note. If the landowner did not implement the corrective actions, send a second letter with a second, shorter timeline (thirty days) or give the landowner a call first to discuss what the obstacles exist to implementation and assist the landowner to move forward. Inspect the site at second deadline date. If compliance, send the landowner a thank-you note. If non-compliance, notify Board and legal counsel to discuss legal action. Attorney sends a third letter that gives notice of impending legal action if immediate compliance is not achieved. Send copies to land trust. Initiate corrective measures, if necessary

If no response to first notice and violation is not causing irreparable damage needing injunction, land trust counsel to send letter to the landowner that gives notice of violation and timeframe after receipt of notice to correct violation; may attach copy of complaint to be filed with appropriate court if landowner does not cooperate. Copy to land trust.

If land trust and landowner connect, attempt a voluntary, negotiated resolution to the violation. Land trust to give the landowner X days to cure the violation or restore the portion of the property to its prior condition in accordance with a plan approved by land trust. (Many violations are caused unintentionally by landowners, abutters, or other parties who are unaware of or did not understand the easement).

If disagreement between landowner and land trust as to whether or not a use or activity violates the provisions hereof or whether either party has acted unreasonably in the exercise of any discretionary power, then land trust may submit the issues to mediation and shall participate in settlement negotiations and discussions in good faith.

Use mediation when the landowner and land trust cannot agree on reparation but are willing to work with a third party that is not a court.

Sample 3.

Inspection: Visit site, physically inspect violation; Inspect site at deadline date set for remediation or restoration, corrective measures and compliance; Follow site visits with letter that documents conversation and discussion of alternatives. If an agreement has been reached, the letter will document the chosen remediation and a schedule of restoration as appropriate.

Sample 4.

Third Party Notice / Contact: If a third-party such as an adjacent landowner is responsible for or caused the violation, arrange a meeting with all parties, verbally or in writing (and make record of violation given in writing if required by the conservation easement) to schedule a meeting to discuss the violation and its remedy, being sure to include the landowner.

Even if the landowner did not cause the violation, the landowner may still be held legally responsible depending upon the precise language of the easement. The third party and the landowner may both or each be held responsible together or separately for remediation to the extent possible.

Sample 5.

Compliance: If the matter ends with prompt compliance, land trust shall send a written acknowledgement to the landowner of compliance and thank the landowner for a quick response.

Sample 6.

Litigation and Alternative Dispute Resolution require land trust examination to be certain there are adequate funds to cover legal expenses, hire and prepare the best legal counsel it can find, actively participate in the formulation of the case, use the land trust's careful documentation of the violation, baseline, and monitoring documentation and experience on the property to its fullest advantage.

Legal counsel should be brought in early but at the appropriate time. Legal counsel may be especially useful to negotiate adequate reparation when complete restoration is impossible.

Land trust should be briefed by legal counsel on proper procedures, conduct, correspondence, and other communication to protect the trust's legal interest and so that records should be adequate to demonstrate the chain of events to a court, should litigation later become necessary.

Land trust with legal counsel should decide the best course of action regarding litigation or mediation.

Analysis of Sample Policies

Samples 1 and 2 attempt to lay out a more detailed approach to working with the landowner to resolve the violation. Sample 1 tailors its approach proportionally to the violation severity under a four tiered system. Sample 2 does not tailor the approach to violation severity but does give specific guidance on approach. Since it is arguably the most delicate and complex part of any violation resolution process, it may be advisable to be both proportional to severity and detailed in this part of the process. Your implementation of the procedures may be flawless and still result in unnecessary escalation of the conflict if the landowner conversations and correspondence is not handled well. Sample 3 is very general. Inexperienced land trusts may need more guidance than Sample 3 provides. Sample 4 is good in that it separates third party violations from landowner violations. This is an important point since most third party violations occur without the landowner knowledge or consent. Marin Agricultural Land Trust has a detailed landowner contact procedure that emphasizes careful contact with landowners. Dutchess Land Conservancy has an excellent "contact the landowner" procedure that emphasizes listening to the landowner and determining intent and then determining a response.

VII. POST-ENFORCEMENT ASSESSMENT AND EDUCATION

Upon conclusion of the violation resolution, response, and remediation, the _____ land trust shall review its actions and attempt to draw conclusions as to [landowner education, compliance, legal counsel involvement, model easement language, this policy, amendment policy, public perception] _____. The land trust shall implement any insights gained from this review of its actions in future actions.

Sample Provisions

Sample 1.

Education and Data Collection Land Trust shall gather what it can from experiencing violations. Feedback from landowners should be collected and discussed with project staff or volunteer and legal counsel to improve how to develop projects and write conservation easements. Land Trust should report regularly on these experiences and what is being learned. If Land Trust has the wherewithal, collect this information in a database to identify trends and issues and track the effectiveness of chosen responses. Database has the violation classification and resource affected, date of observation and the ultimate response and resolution.

If Land Trust has not already notified The Land Trust Alliance of violation, notify the Land Trust Alliance post-violation resolution.

Sample 2.

Learning and Data Collection. We collect what we learn from experiencing violations and feedback from landowner, and then we discuss the information with project staff and legal staff to improve how projects development and conservation easement drafting. Stewardship staff reports regularly on these experiences and what we are learning. We also collect this information so we can identify trends and issues, and track the effectiveness of responses.

Analysis of Sample Policies

We often forget to look back and learn from our experiences and to track and report trends. Having either of these examples in your policy will remind to do these two important items. Most violation policies do not include these statements. Both statements are fairly similar in gathering data in a database, interviewing landowners for comments, and analyzing violation experiences to inform and change systems. Sample 1 has a good addition of reporting to the Land Trust Alliance so others can learn too. Only the Vermont Land Trust sample in the attachments has a learning statement. That is reproduced above as Sample 2. Teton Regional Land Trust has a requirement of violation reporting to the Land Trust Alliance so presumably they are collecting data in a database but that is not explicitly stated.

Dating your Policies: Please Note: Always date your policies and procedures. It helps keep track of the most current version. Include the date of first adoption and the most current revision date. At a minimum use the most current revision date alone if you wish.