

Policy and Procedure 10-1

Open-Space Easement Development

Issued By:	Robert W. Farrell, State Forester
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Codes/Mandates:	Constitution of Virginia: Article XI Sections 1 and 2 Code of Virginia: §10.1-1700 through 10.1-1705 Open-Space Land Act Code of Virginia: §2.2-3700 et seq. The Virginia Freedom of Information Act
References:	Internal Revenue Code: §170(h)(1) Qualified Conservation Contribution United States Treasury Regulation: §1.170A-14(c)(1) Qualified Organization
Forms:	Form 10.1 Open-Space Easement Donation Application Form 10.2 Open-Space Easement Landowner Checklist

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PURPOSE

To provide guidance for consistent acceptance and development of easements held by the agency and make certain easement conveyances to the agency meet the necessary rigorous review and due diligence requirements prior to execution and recordation.

POLICY

It shall be VDOF policy to accept easement interests on forested property that:

- ◆ Are within program guidelines and support the broader agency mission.
- ◆ Are in accordance with the OSLA and these procedures.
- ◆ Meet due diligence and rigorous review requirements established by the IRC and US Treasury Regulations.

It shall further be VDOF policy that any easement will include a deed, Baseline Documentation Report (BDR) and title insurance policy.

DEFINITIONS

“Agency” and **“VDOF”** mean the Virginia Department of Forestry.

“BDR” means Baseline Documentation Report.

“Commonwealth” means the Commonwealth of Virginia.

“Donor” means a landowner who conveys an easement to VDOF, to include a designee, legal counsel or representative.

“Easement” means open space easement conveyed to VDOF under the Open-Space Land Act.

“Easement development” means all necessary steps and required documents to draft an easement.

“Easement property” means the tract of land, parcel or acreage, which will be or is encumbered by an easement.

“Execution” means the act of signing the easement and/or BDR by all parties to the easement.

“FC Committee” means the Forestland Conservation Committee, and generally denotes a meeting of forestland conservation staff for the purposes of easement review and program business.

“FC staff” means Forestland Conservation Program personnel individually or collectively, usually referring to forest conservation specialists, forestland conservation coordinator, forestland conservation program manager.

“FOIA” means the Virginia Freedom of Information Act (Code of Virginia [§2.2-3700 et seq.](#)).

“FSMP” means forest stewardship management plan (or equivalent).

“Guidelines” means those rules, protocols and details necessary within the Forestland Conservation Program which are established to affect this policy and procedure.

“IRC” means Internal Revenue Code.

“LPTC” means Land Preservation Tax Credit.

“FC program manager” means forestland conservation program manager, or designee.

“Recordation” means the act of presenting the executed easement to the local Circuit Court Clerk and the subsequent entering of the easement into the public record.

“OAG” means the Office of the Attorney General.

“OSE” means Open-space Easement

“OSLA” means the Open-Space Land Act (Code of Virginia [§10.1-1700 et seq.](#)).

“Program” means VDOF easement program.

PROCEDURES

An easement grants a real property interest to VDOF. Developing, executing, and recording an easement is a multi-stage process that includes many steps. On average, the process for completing a VDOF conservation easement, from initial acceptance to recordation, takes 9-12 months to complete for fully donated easements, but can take substantially longer if grant funding is involved or if the Commonwealth is compensating the landowner for some of the easement's value (i.e., "partial purchase easements").

Criteria for Program Eligibility

To be eligible for the program:

- ◆ The property must be a minimum of 50 acres, except in the cases described below; and
- ◆ The property must be at least 75 percent forested, except in the cases described below; and
- ◆ The donor must be willing to retain a minimum acreage in forest use, according to program guidelines; and
- ◆ The donor must be willing to have a FSMP developed for the property and manage the forest resources according to the FSMP; and
- ◆ The donor must be willing to follow all Best Management Practices for Silvicultural Water Quality, including buffering all watercourses and water bodies.

Exceptions

- ◆ Properties less than 50 acres may be considered if:
 - They are contiguous to an existing easement; or
 - They are owned by the original donor, and the donor wishes to amend the original easement to include the new acreage; or
 - The property contains a significant conservation value (such as rare or diminished species, or directly adjacent to a drinking water supply); or
 - It is potentially the first VDOF easement in a county.
- ◆ Properties less than 75 percent forested may be considered if:
 - They have a minimum of 100 acres contiguous forest cover; or
 - All or a portion of the non-forested acreage is dedicated to establishing tree cover that would bring it up to the minimum threshold by the time of recordation, as evidenced by some commitment such as a contract, cost-share application and award, or other similar agreement.
- ◆ If a potential property meets program criteria, and appears that it will be a good fit for the program, Forestland Conservation (FC) staff will direct the potential donor to complete and submit [Form 10.1 Open-Space Easement Application](#) for evaluation by the FC Committee (see Application and Selection Process below).
- ◆ FC staff may use [Form 10.2 Open-Space Easement Landowner Checklist](#) to pre-evaluate the compatibility of a potential donor's property and goals. Those properties determined to not be a good fit for the program will be referred to another easement holder, if possible, although potential donors, if they wish, may still submit an application for full consideration and evaluation by the FC Committee.

Application and Selection Process

Landowners interested in conveying an easement to VDOF must submit a properly completed Form 10.1 Open-Space Easement Donation Application to the appropriate regional FC staff. The application must be signed by the legal landowner of the property.

Application "Batching" Deadlines

- ◆ For fully donated easements, where 100% of the value of the easement will be donated by the landowner to the Commonwealth, applications must be submitted to a FC staff member by one of several "batching" deadlines

distributed somewhat evenly throughout the calendar year (e.g.: January 31, May 31, or September 30). Specific dates will be posted on the VDOF website. All applications submitted by a particular batching deadline will be evaluated together by the FC Committee and ranked against one another.

- ◆ For grant-funded easements (only non-VDOF administered grants), where applicants plan to seek grant funding to directly compensate the landowner for all or part of the easement's value or associated transaction costs (appraisal, survey or other due diligence costs), applications must be submitted at least eight weeks prior to the grant-deadline, unless the grant itself is announced less than 10 weeks before the grant deadline. In the latter case, applications must be submitted within two weeks of the grant having been announced. These deadlines are established to provide VDOF sufficient time to: a) evaluate all easement applications that will be submitted for a particular grant, b) assess the potential conservation value of proposed easements, and c) assess VDOF's capacity to support the grant applications and subsequent grant management. For any particular grant opportunity, VDOF may choose to support all, some, or no grant applications.
- ◆ For easements where applicants plan to seek grant funding directly from VDOF (e.g. Forest Legacy or other VDOF administered grant program), applications must be received by the deadline specified in the grant announcement.

Selection Process

- ◆ Applications submitted prior to any particular "batching" deadline, including fully donated and grant-funded easements, will be evaluated together.
- ◆ An FC staff member will contact the District Forester for the work area to inform them that the Program has received an easement application for the property and to inquire if the field staff have any concerns or important information about the property. Such information will be considered during the selection process.
- ◆ An FC staff member will use the VDOF Easement Scoring Calculator to score applications.
- ◆ Within two weeks of a batching deadline, the FC committee will rank applications within the same batch and select which proposed easements, if any, the agency will pursue. Final selection will be based on application scores, ranks, and VDOF's capacity to shepherd the easement to recordation within the next 1-2 years. For projects that score and rank highly, but for which the FC Committee decides that VDOF does not have capacity and resources to shepherd the easement to completion within 1-2 years, FC Staff will suggest that the applicant resubmit the application in one year for reconsideration.

Initial Acceptance Letter (IAL)

- ◆ An IAL (also referred to as an engagement letter) is mailed to the applicant within one week of selection of their easement. The IAL commits VDOF to work with the donor and hold the easement, provided its terms are within program guidelines. Copies of the letter are included in the easement file and provided to the forestland conservation coordinator (FCC) and the FCC will notify the District Forester. The letter or attachment should indicate the documents that the landowner will need to provide VDOF so that the agency can develop and close an OSE deed and associated deadlines for delivery of each document. For documents 1-3 below, deadlines should generally be within 4 months of sending the engagement letter, however this may longer in some cases and may be extended depending the speed at which basic easement terms can be developed and agreed upon. The needed documents will differ depending on the case and whether the easement is fully or grant-funded, but may include:
 - An appraisal report
 - A title commitment and associated title binder
 - A survey of the property
 - Letters or agreements indicating that any institutions or individuals with liens or deeds of trusts on the property are willing to subordinate their interests to the OSE deed
 - A sustainable forest management plan
- ◆ Conveying an easement is entirely voluntary, and the donor is under no obligation to convey the easement until it is recorded. A donor may terminate the process at any point for any reason.

- ◆ Applicants whose projects are not selected in a particular batching meeting may be sent a letter inviting them to apply in future batching periods.
- ◆ The application and any accompanying documentation are subject to public disclosure under FOIA.

Easement Development, Review and Approvals

Legal and Financial Advisors

- ◆ A donor forfeits certain property rights as a result of the easement. The easement establishes a permanent interest in the property for the Commonwealth, which will change how a property may be used in the future and its market value. Because this change can have significant tax and estate planning consequences, it is strongly recommended (but not required) that donors retain legal counsel and/or financial advisors.
- ◆ If a donor chooses not to be represented by legal counsel, FC staff will document that decision in the easement file. The Office of the Attorney General (OAG) will not prepare an easement for a donor, so the donor must negotiate and draft the open-space easement (OSE) on his/her own behalf.
- ◆ Upon request, FC staff will provide a list of attorneys who are familiar with easements and the program, and appraisers known to be familiar with easements.
- ◆ The donor must be copied on any correspondence with the donor's attorney during easement development.
- ◆ Under no circumstances will FC staff provide legal, appraisal or financial advice to donors.

Easement Service Providers

- ◆ VDOF recognizes the role of easement advisors or service providers who may work on behalf of donors to actively manage and facilitate the donation process. Actual negotiation of, and agreement to, easement terms and restrictions shall be carried out with the donor or the donor's legal counsel only, and not with service providers. Donors and their attorneys shall be copied on any correspondence with advisors during the development process.

Review and Approval

All easements must meet due diligence and rigorous review requirements prior to execution and recordation.

- ◆ Due diligence includes the multiple steps necessary as established by program guidelines to:
 - Verify legal ownership of the easement property.
 - Confirm easement property boundaries and acreage.
 - Discover encumbrances on or third-party interests in the easement property.
 - Describe the conservation attributes of the easement property.
 - Ensure the easement terms are supportive of, in compliance with or not in conflict with local, state and federal policies and programs.
- ◆ Rigorous review is a sequential process that ensures due diligence standards have been met, and the easement is legally valid and consistent with agency goals and mission.
- ◆ Rigorous review consists of FC committee pre-review and approval, FC committee review and approval, and review and approval by any associated grant organization(s) supporting the project according to grant guidelines/requirements (e.g., Forest Legacy Program or Virginia Land Conservation Foundation), OAG final review, and approval by the FC program manager and VDOF executive staff.
- ◆ All easements shall be subject to this level of review according to program guidelines.

FC Staff Pre-Review and Approval

FC staff will pre-review and approve to preliminarily agree on the terms that will form the basis of the easement. FC staff will summarize the property attributes and preliminary easement terms, along with draft maps and exhibits, on a term sheet signed and dated by the donor, and present it to the FC Committee for comment.

- ◆ FC staff shall have at least one in-person meeting with the donor prior to pre-review of the terms of the easement to ensure the donor fully understands the easement, its terms, restrictions, and its implications.

FC Committee Review and Approval

FC staff will review and approve to confirm the easement and title insurance commitment meet program standards and established guidelines. It ensures due diligence requirements have been adequately met.

- ◆ Easements submitted for FC staff review and approval shall contain at a minimum the following documents:
 - Easement draft, compared to current template, including exhibits to be attached to and made part of the easement.
 - Title insurance commitment, with brief explanation or summary of items exempted from coverage.
 - Source deed and any other legal instruments needed to clarify property ownership or boundaries, or exceptions from insurance coverage.
 - Any other information necessary to illustrate easement terms or conditions and attributes of the property.

Program Review and Approval

Program review and approval is conducted by the FC program manager to ensure that all changes recommended during FC staff review have been made and that all documents necessary for OAG and agency executive approval are complete and in a satisfactory form.

OAG Review and Approval

The OAG is responsible for legal review and "approval as to form" of all real estate transaction documents to which the Commonwealth is a party, including open-space easements. In addition, the OAG review and approval ensures that the transaction and the execution were properly authorized by all parties to the easement.

Agency Executive Review and Approval

Agency executive review is conducted by the designated agency executive staff (typically the Assistant State Forester and State Forester). This level of review confirms easement alignment with agency policy and mission.

Baseline Documentation Report (BDR)

A BDR is required to be prepared according to program guidelines for all easements. The BDR will include one or more site visits and written report composed of text, maps and photos that document the property at the time of the easement. FC staff will initiate the BDR prior to the FC staff review and approval; the BDR must be in final form and approved by the donor prior to execution.

Easement and BDR Execution

- ◆ VDOF will prepare the signature version of the easement and BDR. Upon final approval, FC staff will finalize the signature copy of the easement and BDR and notify the FC program manager to initiate the signature process. The BDR will be executed simultaneously with signing of the easement.
- ◆ At the direction of the FC program manager, FC staff will prepare and print one original copy of the easement and two original copies of the BDR. The easement will be printed single-sided on bonded paper. The BDR will be printed single-sided, in color, on regular copy paper.
- ◆ At the direction of the FC program manager, FC staff will send the documents, with instructions, to the donor in such a manner as they can be tracked.
- ◆ The easement will be routed for signatures in the following order:
 - Donor > Lender (if necessary) > Loan/Mortgage Trustee (if necessary) > State Forester
- ◆ The Lender and Trustee are not required to sign the BDR.
- ◆ The state forester is the final signatory on the easement and BDR; only the state forester, deputy state forester and assistant state forester have authority to sign the documents. The deputy state forester or assistant state forester shall sign the easement or BDR only in urgent situations if the state forester is unavailable.

- ◆ The easement and BDR are considered fully executed when all parties sign the documents.

Easement Recordation

- ◆ Once fully executed, VDOF will return the easement to the donor for recordation among the land records in the local Circuit Court. The donor is responsible for recording the easement. If the easement is not delivered in person, it will be sent in such a manner as it can be tracked.
- ◆ The easement shall be recorded in all jurisdictions in which the easement property lies.
- ◆ Once recorded, the donor will return the original easement, with the Circuit Court clerk's stamp and recording receipt, to VDOF.

Post Recordation

- ◆ The BDR will be updated with the recording information. One originally signed BDR is provided to the donor; VDOF retains the second originally signed BDR in the permanent easement property folder.
- ◆ FC staff will notify the VDOF contact with primary responsibility for easement monitoring (currently the Forestland Conservation Coordinator) and District Forester that the easement has been recorded.
- ◆ The donor arranges for the final title insurance policy and provides it to VDOF. FC staff will review the policy terms to confirm they are consistent with the final title insurance commitment.
- ◆ FC staff will provide a Landowner Notification Guide and easement sign to the donor.
- ◆ The FC program manager shall prepare a gift acknowledgement letter to the donor acknowledging the conveyance of the easement. The gift acknowledgement letter may only be signed by the state forester, deputy state forester or assistant state forester.

IRS Tax Form 8283 Noncash Charitable Contributions

- ◆ If the donor plans to apply for state or federal income tax benefits, the donor must complete an IRS Tax Form 8283. The donor is responsible for preparing and providing the 8283 to VDOF; FC staff will not prepare the 8283 for the donor.
- ◆ The FC program manager will verify the following information on the 8283:
 - The name is the same as the donor.
 - Section B, Part 1, *Information on Donated Property* has been completed.
 - Section B, Part 3, *Declaration of Appraiser* has been signed and dated by the appraiser.
- ◆ The FC program manager will complete Section B, Part IV, *Donee Acknowledgement*. The acknowledgement date is the recordation date of the easement.
- ◆ The 8283 may only be signed by the state forester, deputy state forester or assistant state forester. VDOF will not sign an incomplete 8283 or one that has not been signed by the appraiser.
 - VDOF may sign a scanned copy or fax of the 8283 provided it is complete and signed by the appraiser.
 - Additional 8283's may be signed provided they are acknowledging the same gift and the information is identical to the 8283 that was signed initially.

Release of Gift Acknowledgement Letter and IRS Tax Form 8283

VDOF will release the gift acknowledgement letter and IRS Tax Form 8283 when the easement transaction is complete. VDOF considers the transaction complete when it receives:

- ◆ The original recorded easement with the clerk's stamp and recording receipt.
- ◆ The final title insurance policy reviewed and approved by FC staff.

IFRIS

Conservation staff will create the easement in IFRIS, and enter the easement information within a week of receiving the recorded easement. Structures and structure placeholders for the easement will be created simultaneously.

Time Recording

- ◆ Any and all time spent effecting these procedures shall be recorded in IFRIS as follows:
 - Conservation Easement Mgt > Other Development Activities

Accomplishment Recording

- ◆ There is no accomplishment code for easement development in IFRIS.

File Management

FC staff will create physical, digital and GIS easement property folders for all easements within two weeks of recordation. The folders shall be labeled, organized and contain information according to program guidelines.

- ◆ There are four levels of file organization:
 - Physical folders
 - Permanent folder (red)
 - Monitoring folder (blue)
 - Digital folder
 - GIS folder
- ◆ Each folder shall be assigned a unique easement identifier that consists of an exclusive easement number and easement name. All folders and files shall carry this identifier.
 - The easement number is auto-generated by IFRIS at the time it is entered.
 - The easement name is assigned by FC staff at the time of IFRIS entry

Permanent (Red) Folder

The permanent folder contains any and all documents originally signed by the agency, including but not necessarily limited to the easement deed and BDR, and the final title insurance policy. These folders are maintained in a fireproof cabinet at VDOF Headquarters.

Monitoring (Blue) Folder

The monitoring folder contains a copy of the easement and BDR, exhibits, current FSMP, plats and any other documentation that details the condition of the easement property at the time of the easement. The most recent monitoring report of the easement property may be included. These folders are maintained in a secure location in the VDOF Head Quarters building with the FCC.

Digital Folder

The digital folder will contain scanned versions of the documents within red and blue folders and additional information to document due diligence and rigorous review and support the stewardship of the easement property. The digital folders will be maintained on the VDOF H: drive.

GIS Folder

The GIS folder will contain the final easement shapefiles, including at a minimum, the easement property boundary, the allowable building areas, the photo points and any designated areas or points (habitat protection areas, historic protection areas, enhanced buffers, cemeteries, etc.).

AUTHORITY

This policy and procedure is issued by the Virginia state forester.

INTERPRETATION

The forestland conservation program manager and assistant state forester are responsible for the interpretation of this policy and procedure.

APPROVAL

I certify that this policy and procedure is approved and ready for publication.

Karl Didier

Forestland Conservation Program Manager Name (Print)

Forestland Conservation Program Manager Signature

Terrance Lasher

Assistant State Forester Name (Print)

Assistant State Forester Signature