

FLOWAGE EASEMENTS

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A. OVERVIEW

A.1. General

These instructions should be used to prepare flowage easements if needed to accompany conservation easements when restoring drained wetlands. A flowage easement secures the right for the state to temporarily or permanently flood an area as a result of restoring a drained wetland. With the exception of access rights to and flooding of the flowage easement area, no other rights are purchased as part of the easement. The only restriction placed on the property is that the landowner cannot appropriate or drain waters from the flowage easement area without written approval from the State.

Flowage easements provide landowners who do not want a conservation easement with another option to cooperate with neighboring landowners on a wetland restoration project. It is a good tool to use for many areas along side wetland restoration projects where securing conservation easements is not an option or just not necessary for the site. When conditions permit, the flowage easement area can be cropped, pastured or hayed. A flowage easement alone cannot be used to restore a drained wetland. It must coincide with at least one conservation easement either with the same landowner or with a neighboring landowner. Since there is typically no compensation given for flowage easements, they can be taken on lands enrolled into other programs including CRP without termination from the program.

A flowage easement can be taken on any parcel of land; it can be taken with the same landowner applying for a conservation easement or with an adjacent landowner who will be impacted by the proposed wetland restoration.

A.2. Payment for Flowage Easements

Because flowage easements do not restrict agricultural activities on the easement area, they are typically donated to the State with no compensation made to the landowner. However, the State does have the option to pay for flowage easements in cases where it is deemed absolutely necessary to complete a high priority wetland restoration project. Payment terms for such situations would be made on a case by case basis. Conservation groups or other third party supporters of a project could also compensate the landowner upon the successful acquisition by the State of a donated flowage easement.

The State will, in certain situations, pay for the cost of updating the landowner's abstract when doing so for securing a flowage easement. Refer to Processing Procedures in sections C and D below for more information regarding this item.

A.3. Flowage Easement Area

The area included in a flowage easement is typically described as the area being below a certain elevation as defined from the topographic survey of the site. The elevation reference in the flowage easement document must be at a mean sea level datum. The elevation chosen for the flowage easement boundary is typically two feet above the planned restored wetland elevation. However, certain situations will allow this elevation difference to be lower than two feet and some will require it be more. Factors such as soils, hydrology, hydraulics and topography will all affect the elevation chosen for the flowage easement. Work with easement program staff to establish the proper flowage easement elevation.

If tying the site into mean sea level datum is not possible or practical, the State can describe the flowage easement area much the same way it describes the area for a conservation easement.

B. APPLICATION PROCEDURE

B.1. Flowage Easement Application Information

Flowage easement applications should be submitted during a normal sign-up period along with the associated conservation easement application(s) for the project. However, the State will accept the application for a flowage easement at any time should the need for it be determined after acceptance of the adjoining conservation easement(s).

The general *Conservation Easement Application* form should be completed and signed when submitting a flowage easement application. A separate easement number should be designated for the flowage easement application.

B.2. Necessary Site Information

For flowage easements, very little site specific information is required at the application stage. The approximate acreage of the flowage easement area should be indicated on the application form. An aerial photo should be submitted showing the approximate flowage easement area in relation to the adjoining wetland restoration conservation easement(s). The proposed wetland restoration boundary should be depicted as well.

It is likely that the exact area and elevation required for the flowage easement boundary will not be known at the time the application is submitted. Therefore, it is not required to have the site tied to mean sea level datum at this time. This can be done after the project is approved for funding.

C. PROCESSING PROCEDURES - SAME LANDOWNER

C.1. General

Follow the procedures in this section when processing a flowage easement and a conservation easement with the same landowner on the same parcel of land. If the two easements are being processed concurrently, the flowage easement acquisition process will follow along with the conservation easement acquisition process eliminating the duplication of several steps.

C.2. Basic Steps

Step #1 As part of preparing the agreement package for the conservation easement, identify clearly on the aerial photo being submitted the flowage easement boundary in relation to the conservation easement boundary. Refer to [Section F of the Easement Agreement subsection of the Agreement Stage section](#) of the handbook for more information regarding this step. This step is important in that the boundary of described lands used to create the conservation easement's legal description will need to include the flowage easement area. Some modification of the flowage easement boundary will still be allowed as the elevation for it is likely still being determined.

Step #2 As part of developing the agreement documents for the conservation easement, BWSR staff will also prepare the legal description for the flowage easement.

Step #3 Follow [Section B, Title Insurance](#), in the Easement Stage section of the handbook for instructions on purchasing title insurance policies. When requesting the title insurance commitment, be sure to inform the title agent that two easements are being processed and the conservation easement's legal description also includes the area of the flowage easement. The agent should prepare one commitment covering both easements. If the flowage easement is being donated, the value of the conservation easement should be used to determine the amount of title insurance requested. If payment is also being made for the flowage easement, increase the amount of title insurance accordingly.

SWCD expenses incurred when purchasing title insurance are reimbursable. Refer to [Section C, State Reimbursement for Title Insurance Expenses](#), in the Easement Stage section of the handbook. When the landowner is granting both a flowage easement and a paid conservation easement, **the landowner will not be reimbursed for the costs of updating the abstract.**

Step #4 After approval of the title insurance commitment, BWSR will prepare the flowage easement exhibit A and both easement documents and will send

them to the SWCD for signatures and recording. As part of preparing the flowage easement, BWSR realty staff will need to know the mean sea level elevation and datum chosen for the flowage easement. Please provide this information at this time if you have not done so already. Be sure that both easements are recorded at the same time and that they are covered in the same final title policy.

D. PROCESSING PROCEDURES - DIFFERENT LANDOWNER

D.1. General

Follow the procedures in this section when processing a flowage easement with a neighboring landowner who is not also granting a paid conservation easement.

The procedures under this scenario are slightly different to those procedures in Part C above. These procedures will require you to utilize and follow several parts of the processing framework established for securing a conservation easement. Process the flowage easement in a timely fashion so it follows closely with the other easement(s) associated with the project.

D.2. Basic Steps

- Step #1** Submit the following items as they relate to the flowage easement area:
- ❖ A completed Agreement Information Form. This will include all of side one and the applicable portions (if any) of side two.
 - ❖ A copy of the abstract's cover and legal description.
 - ❖ A copy of the deed for the land.
 - ❖ An aerial photo accurately depicting the flowage easement boundary in relation to the boundary of the adjoining conservation easement(s).

Upon review of this information, BWSR realty staff will notify the SWCD if any additional information is needed. For more information regarding these items, refer to [Sections A thru F of the Easement Agreement subsection of the Agreement Stage section](#) of the handbook.

- Step #2** BWSR staff will prepare the legal description for the flowage easement. This information will be returned to the SWCD so title insurance can be requested.

- Step #3** To request title insurance for the flowage easement area, follow [Section B Title Insurance of the Easement Stage section](#) of the handbook. If the flowage easement is being donated, the value of the adjoining conservation easement should be used to determine the amount of title insurance requested for the flowage easement's title policy. If payment is being made for the flowage easement, add that amount to the value of the

adjoining conservation easement to determine the amount of title insurance requested for the flowage easement's title policy.

SWCD expenses incurred when purchasing title insurance are reimbursable. Under this "different landowner" procedure for processing a flowage easement, **the cost of updating the abstract is reimbursable if the flowage easement is being donated.** The SWCD will initially incur the expense of updating the abstract and should submit a request for reimbursement. Refer to *Section C, State Reimbursement for Title Insurance Expenses, of the Easement Stage section* of the handbook for more information regarding reimbursement procedures.

Step #4 After approval of the title insurance commitment, BWSR will prepare the Exhibit A and send it, along with the flowage easement and legal description, to the SWCD for signatures and recording. As part of preparing the flowage easement, BWSR realty staff will need to know the mean sea level elevation and datum chosen for the flowage easement. Please provide this information with the title commitment unless you have already provided it. Be sure that all easements associated with the project are recorded at the same time.