

### IIIE 3.0 EASEMENT ENFORCEMENT GUIDELINES

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Although there have been no legal actions concerning NCC easements to date, it is appropriate to anticipate such risks, and to consider potential infringements and how NCC will deal with them. This guideline is an initial attempt to start work on a standard guideline to assist staff in this area.

Realistically, easement restrictions may be considered to fall into two general types:

- 1) Clear – Restrictions that are very black and white, and obvious in meaning.
- 2) Interpretable – Restrictions that are less clear, and more subjective in interpretation.

Parallel to this, the types of infringements that occur may also be classified in the same manner:

- 1) Clear – Infringements that are blatantly against the easement restrictions, i.e., either the infringement happened or it did not.
- 2) Interpretable – Infringements that may or may not be intentionally against the easement.

At present, some NCC easements may be interpreted to allow for some infringements that are minor in nature and that do not have a long-term or cumulative effect on the conservation values of the property. However, the lesson is that “clear” restrictions may result in better kept easements because infringements will be similarly “clear”. Over time, through the use of clear language in easements, clear and agreed baseline reports, and good communications with landowners, NCC wishes to move towards clear, tight easements that are defensible.

In the case of “clear” infringements that have a long-term negative effect on conservation values, such as an infringement against the restriction against subdivision, land clearing or logging, NCC would take immediate action to enforce the restriction – following the steps outlined in the easement – up to and including legal action as a last resort. It is anticipated that, for a clear infringement to a clear restriction, a judge would likely find in favour of NCC and thereby set favourable precedent.

In the case of “interpretable” infringements that may or may not have long-term negative effects on the conservation values of a property, it may not be possible to enforce the restriction through law. For example, a restriction to maintain range condition in “a good or better state” can be quite subjective. The approach with these types of restrictions, from the start of the easement, is to work in an extension-style role with the landowner to assist them in meeting that restriction, i.e., the health of the range. The landowner may be doing everything we ask and appear to be making a concerted effort, however, there is something that perhaps we do not understand or perhaps he is intentionally doing something that is keeping the land in less-than-good condition or degrading the range. Either case may be difficult to prove. The initial approach to dealing with such infringements is to continue working with the landowner.

Beyond this, case-by-case decisions will be required by NCC staff and managers to achieve the specific conservation goals of the easement. On such “subjective” restrictions, NCC would also seek legal opinion before taking legal recourse on such an infringement, especially considering the precedent set by such action.

With easements that were established through EcoGift donations, the situation is further complicated because decisions on whether a possible infringement is a “clear” or “interpretable” also rest with Environment Canada staff, and changes in baseline conditions at sites are potential triggers for issues relating to whether an easement has failed and is the subject to EcoGift clauses cancelling donation-receipt benefits. In such cases, it is important to work closely with Environment Canada EcoGift staff in assessing impacts of potential easement infringements.