APPENDIX M- Forest Legacy Program Conservation Easement Drafting and Review Checklist

Before conservation easement drafting begins the State Forest Legacy Program (FLP) manager will meet with the Regional, Northeastern Area (Area), or the International Institute of Tropical Forestry (IITF) (Region/Area/IITF) FLP manager to discuss FLP conservation easement requirements.

Before a project closes, the Region/Area/FLP manager will review the final conservation easement.

The FLP conservation easement checklist is an explanation of the requirements for FLP conservation easements. The intent is to make conservation easement drafting by the States more efficient and to help Region/Area/IITF FLP managers communicate FLP requirements with others. The checklist includes items which are required by the June 2003 FLP Implementation Guidelines plus other considerations. There may be additional Region/Area/IITF requirements for conservation easement language. These requirements are not discussed in this document.

Also, State law may require or prohibit particular language or a particular format. It is not possible to develop a single conservation easement to meet all needs. Each State is different, each deal is different. What is the same from easement to easement is that the purpose of the document is to implement the State Forest Legacy Program.

In addition to meeting program requirements each State has the responsibility to develop conservation easements that do not conflict with their State Forest Action Plan [Which includes the Assessment of Need (AON)]. Each State should supplement the checklist with restrictions or requirements outlined in their State Forest Action Plan (including AON).

Ensuring that all items on the checklist are addressed in an easement does not assure that the conservation easement will implement FLP purposes and is eligible to enter the FLP. A conservation easement or conservation restriction is not merely a collection of clauses but a document that stands as a whole. The entire easement must be reviewed and evaluated.

The Region/Area/IITF FLP managers can provide examples of provisions that meet the requirements outlined in the checklist.
Forest Legacy Program Conservation Easement Language Checklist
For land to enter the Program the conservation easement must protect forest values and must not have reserved rights that could negatively impact the conservation values being protected. What follows is a list and explanation of what provisions should be included and what should not be included.

Purpose Provision. The purpose clause indicates that the acquisition of the easement supports FLP goals. The June 30, 2003 Forest Legacy Program Guidelines discuss the purpose and authority clauses. Section XIV (page 18) states in part “Conservation easements are required to contain language pertinent to the purpose of the FLP and a reversionary provision to ensure the conservation investment of FLP into the future.” Examples of these are provided in Appendix 1 on page 40 and 41 of the Guidelines.

Reversion Provision (Language Provided in Guidelines)
The reversion clause ensures that the Federal investment will not be lost. This requirement can be found in the Guidelines Part I, Section XIV page 18; and Part 2 Section III pages 24-25. An example of the reversion language can be found in Appendix I of the Guidelines (p41). [Note: this example includes a reference to section 5 A, this is because this example was taken from an actual easement that contained a section 5 A. Make sure to remove this reference, unless of course there is a pertinent section 5 A.]

Assignment language limiting transfer of interest only to another governmental entity. The basis for this requirement can be found in the Guidelines Part 2.II (page 24) “Title to such lands or interests in lands will be vested in the State or unit of State government.” Examples of this language can be found in Appendix I of the Guidelines (p 41). This guidance seeks to address a requirement of the enacting legislation (16 U.S.C. 2103c)(h)(2).

Prohibition/Limitation on subdivision. The Guidelines state that residential subdivision is a noncompatible use (Part 1 Section II). However, the FLP does not absolutely prohibit subdivision of property. Division of the property into smaller parcels may be possible under certain limited circumstances. Pursuant to State law and the State Forest Action Plan (including AON), leases (depending on the purpose and terms) and bona fide boundary line adjustments are a normal and acceptable exception to subdivision prohibitions.

In some cases, it also may be appropriate to allow limited future division of very large projects into smaller parcels. If the project allows for subdivision; how this will occur should be clearly laid out in the easement, sizes and which parcels will be subdivided should be determined and be identified in the conservation easement. The easement should be clear that the easement follows the subdivided parcels and will be rerecorded. If there is to be a division of a reserved right, be clear how it will be divided. Keep in mind that subdivisions can quickly double and triple the administrative demands of a project. In other words, the work increases but the land protected does not.

Prohibition of industrial, commercial (other than traditional forest uses as defined by State Forest Action Plan (including AON) and residential use of the protected
property. The Guidelines State in Part I, Section 2 that: “Nonforest uses are uses of the land inconsistent with maintaining forest cover including, but not limited to, activities that result in extensive surface disturbance such as residential subdivisions, commercial development, and mining. These uses generally should be excluded from FLP conservation easements or land purchases.” Thus, based on the guidelines, these non-compatible uses should be prohibited, especially when there allowance will make it difficult to protect forest resources.

When there is an existing or proposed future use on the property that is incompatible, those areas should be excluded from the project. If this is not possible, these uses must be within reserved areas. Reserved areas are defined by the Guidelines as “...designated areas where nonforest uses (e.g., house, barn, remote recreation camps, etc.) are or will be allowed, but are inseparable from the land holding and do not have a detrimental impact on the conservation easement values. These areas shall be defined and described in the conservation easement and may be restricted in terms of their use...To the extent possible these area of noncompliance should be excluded from the FLP project.”

A residential building envelope may be included in the conservation easement; this envelope is not within the protected property but is part of the larger property. These envelopes may not be divided from the protected property and may not have a detrimental effect on the conservation easement values. For example, it should be located on the edge of the property on an existing road. Examples of reserved areas that could severely degrade the conservation value of a property, and thus should not be allowed in a FLP conservation easement, include: large or multiple reserved areas, allowance for future construction of many or large structures, locating areas deep within a conserved property, areas in proximity to riparian, wetland, critical wildlife habitat or other sensitive resources.

The location of reserved areas must be identified and surveyed and appropriately addressed in the appraisal.

There may be a need to allow for temporary placement of structures to support compatible uses such as structures related to timber harvest. When drafting language related to temporary structures the extent and timing of the uses should be clear. The easement should be clear that such uses will be outlined in the Forest Stewardship Plan/Multi-use Management Plan.

Prohibition on surface disturbance such as mining or drilling. Non-compatible uses are defined in Part I, Section II (p. 6) of the Guidelines: “Nonforest uses are uses of the land inconsistent with maintaining forest cover including, but not limited to, activities that result in extensive surface disturbance such as residential subdivisions, commercial development, and mining. These uses generally should be excluded from FLP conservation easements or land purchases.”

It is possible to allow limited excavation of sand and gravel for on-site use for roads and landings and otherwise support allowable activities. The extent and location of such activities must be clearly outlined in the conservation easement. The size and extent of
such uses will be determined through consultation between the State and Region/Area/IITF managers. Such activities should also be addressed in the Forest Stewardship Plan or multi-resource management plan.

Limited oil and gas extraction that does not adversely impact the purposes of the FLP may also be allowable. The impact of such use must be limited and localized. Any lease agreements must be subordinate to the conservation easement and must be developed in consultation with the State lead agency.

Any preexisting severed mineral reservations or leases must be evaluated. The guidelines state in Part I Section XIV that “...a determination will be made as to whether the mineral rights, prohibition on reserved areas, or an exclusion of the area that does not comply with FLP would be necessary in order to protect the other rights that are being considered for acquisition. In some situations, it may be impossible to protect environmentally important forest areas pursuant to the purpose of the FLP without acquiring the mineral rights.” In short, a property or portion of a property may not be eligible to enter the FLP if there are outstanding rights that could adversely impact the conservation values or forest uses of the parcel.

**Duties of Owners Provision** This provision requires the landowner to manage the property in a manner that is consistent with the purposes for which the land entered the FLP and that the landowner shall not convert the property to other uses (see references in paragraph below).

**Requirement for development of and adherence to a Forest Stewardship Plan or Multi-resource Management Plan.** This provision outlines the requirement for the plan. The conservation easement language should be very clear that management activities on the land must be done in accordance and be consistent with the plan. The plan must be approved by the State Forester or designee and must be completed and approved before closing. Generally, the plan period is 10 years but may be longer in accordance with specific State Forest Stewardship Plan policy. Often conservation easements will require that management plans be updated when property changes hands. This is not a requirement but is a good opportunity to meet with a new landowner and review the conservation easement. A definition of the Forest Management Plan can be found on pages 4 and 5 of the Guidelines. The Forest Management Plan is discussed in the Program Guidelines Part I, Section XVI and in Section XVII. Landowner Participation. The requirements for plans and adherence to plans have their roots in the enacting legislation (d.) Implementation. (l) and i. Duties of Owners).

**Language that ensures that compatible non-forest use occupies not more than 25% of the protected property.** [Less if State Forest Action Plan (including AON) further limits the amount] If there is greater than 25% of nonforest uses at the time of closing, ensure that the approved Forest Stewardship or management plan calls for reforestation within 10 years. The Guidelines discuss compatible non Forest in Part I Section II: “Compatible-nonforest uses are nonforest uses of the land that may be compatible with forest uses as part of an undeveloped landscape, including cultivated farmland, pasture,
grassland, shrubland, open water, and wetlands. These nonforest uses should be less than 25 percent of the total area. Forest Legacy funds should only be used on parcels with forestland as defined in a State’s AON. Other funding sources may be used to protect nonforested areas on those parcels with less than the minimum required forest cover.

Language to ensure the right to enter the property to monitor the property. The Guidelines Part I Section XVI page 20 state that: “Monitoring FLP conservation easement shall occur periodically, but not less than annually.” Outlining this in the easement clearly outlines your right to enter and also notifies the landowner that this is an activity that will occur on a yearly basis. Violation and enforcement provisions should also be considered.

Other considerations when drafting conservation easements:
If the landowner plans to take a tax deduction in accordance with IRS regulations, they may request additional language to the conservation easement. Work with your legal counsel to ensure any requests for language are appropriate.

Restrictions should be related to the purposes of the FLP and the Purposes of the conservation easement. Restrictions and reservations in conservation easements should be clear and quantifiable. To the extent possible terms like “to the extent possible” should be avoided. Restrictions and reservations should be quantifiable and ambiguity should be avoided. If terms like reasonable, appropriate, to the extent possible/practicable, limited, unnecessarily or other non-specific terms are in the easement then the easement should be clear about who will determine what is “appropriate”, “reasonable” etc. and how it will be done. These determinations should be done by the easement holder. It benefits both the holder of the conservation easement and the landowner if the conservation easement is clear and unambiguous.

Do not include restrictions that are not tied to the conservation purposes. In some cases a landowner may want restrictions beyond what would normally be included in an easement. For example, a landowner may want a much wider stream buffer or other restrictions beyond State policy or what is dictated by science; to protect water quality and habitat. This not only limits future landowner management options beyond what is needed to protect the conservation values; but may also increase the administrative and monitoring burden of the holder. As a conservation easement holder, you do not have to agree to all the restrictions that a landowner wants.

Conservation easements should include terms that limit additional easements, long-term leases or contracts. Any subsequent easement or agreement should be subject to approval by Grantee. Grantee shall ensure that additional long-term or permanent agreements do not negatively impact the protected conservation values or the purposes of the FLP or would limit the allowed uses of the land; especially if the limitation would be contrary to the reasons the land was entered into the FLP. Such approval may be conditional, denied or granted at the sole discretion of the Grantee. An example of an additional non-compliant easement would be a strict preservation easement that allows no timber management when a purpose of the conservation easement is to support the local timber economy.
Consider including terms that prohibit using property as a set aside to allow for greater development elsewhere. If such an action is allowed there may be no net conservation gain by the protection of the property.