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House Judiciary Committee
Room 30
115 State Street
Montpelier, VT 05633-5401

Re: S. 119

Dear Committee Members,

I write to you as an attorney, board member and past president of a land trust, conservation easement donor and fee land donor. I believe S.119 would greatly damage the existing world of donated or perpetual conservation easements and the land trusts that hold them. If S.119 is enacted, this damage may well extend beyond Vermont to other States.

Conservation easements are not easy for lay people to understand and to trust. Having different rules for conservation easements in different States can only exacerbate that difficulty. My experience with donors and as a donor is that those who donate perpetual easements to land trusts act because they truly love that land and wish to protect it forever, as the land trusts promise to do. Conservation easement donors are clear that their intent is permanent protection of their specific land. Easements reflect that intent with multiple use of the terms "permanent," "perpetual," and "perpetuity," with specific references to features of the land itself—the rock formations north of Oak Creek, the sugar maples, the historic rock walls. Moreover, easement baseline documentation focuses on the specific land with maps, photos and descriptions.

I have seen, worked with and learned about numerous conservation easement donors whose love for their land is so powerful that they donate despite significant financial sacrifice, for example, when their income is so low that they cannot afford the appraisal needed for the tax deduction. Please believe me when I say that donors are motivated by the desire to protect their land. There are, of course, always exceptions to this general rule, but an easement grantor who is not motivated by a desire to permanently protect his or her particular land is free to grant the land trust the discretion in the easement deed to amend, swap, or otherwise terminate the easement.

Darby Bradley has offered his opinion that land trusts should be empowered to swap easement land for other lands. Proposed S.119 section 6301a(6) defines "amend" to include "whole or partial termination" and "substitution of a new easement for an existing conservation easement." His January 15, 2014 Response offers an article by Jessica Jay in support. I oppose their views, and I wrote a response to Jay's article, also in Harvard Environmental Law Journal, www3.law.harvard.edu/journals/elr/files/2013/05/Schwing.pdf, explaining why more than de minimis swaps violate both federal law and land trust promises to donors.

An important distinction must be drawn between federally deducted conservation easements and other easements promised to be enforced in perpetuity, on the one hand, and some purchased easements, term easements, mitigation easements, quid pro quo easements and the like on the other hand. Federal law does not mandate that all conservation easements must be enforced on their original acres in perpetuity. That requirement applies to federally deducted easements and other easements created with a legally enforceable obligation of perpetuity. For these easements, donors must be able to trust that their land is protected in perpetuity or they will not donate.

In the interest of ensuring that the Committee is fully informed, I have enclosed the article I published in response to the Jay article that Mr. Bradley has provided to you. The attached article explains why substantial or wholesale swaps violate federal law as well as promises made to grantors of perpetual conservation easements. You should also be aware that a number of cases decided since publication of the Jay article reject the positions espoused by Mr. Bradley and Ms. Jay regarding the termination and swapping of perpetual conservation easements. The most significant of these are *Belk v. Comm'r*, 140 T.C. No. 1 (2013), supplemented in T.C. Memo 2013-154 on denying reconsideration; *Carpenter v. Comm'r*, T.C. Memo 2012-1, supplemented in T.C. Memo 2013-172 on denying reconsideration, and *Mitchell v. Comm'r*, 138 T.C. No. 16 (2012), supplemented in T.C. Memo 2013-204 on denying reconsideration. *Mitchell II*, for example, flatly rejected the argument that protecting the easement purpose would satisfy the in perpetuity requirements of federal law. *Belk II* rejected floating easements for a second time and held that federal law requires that taxpayers donate a specific piece of land.

Thank you for the opportunity to present this testimony and the attached article. I would be happy to answer any questions you may have or provide you with additional information as you consider these critically important issues.

Ann Taylor Schwing