

COMMENTARY

to the Riparian Forest Buffer Protection Agreement

Introduction to the Tool

The model Riparian Forest Buffer Protection Agreement (the “Protection Agreement”) is a tool to help private landowners and conservation organizations work in partnership to establish permanent riparian buffers along Pennsylvania’s waterways and lakes. The purpose of establishing these buffers is to:

- maintain and improve the quality of water resources associated with the waterway or lake
- perpetuate and foster the growth of healthy forest (or if natural conditions are not conducive to forest growth, then healthy marsh, shrub land, etc.)
- preserve habitat for native species dependent on water resources or forest; and
- ensure that activities and uses in the riparian buffer are sustainable, neither diminishing the biological integrity nor depleting the soil, forest and other natural resources within the riparian buffer over time.

The Protection Agreement achieves these conservation objectives while keeping the property in the landowner’s ownership and control.

The Protection Agreement is an agreement between the landowner (the “Owner”) and the conservation organization (the “Holder”). In the Protection Agreement, the Owner places permanent restrictions on activities that would harm the water, forest, or soil, and the Holder commits to watch over the land and enforce the restrictions.

The Holder of the Protection Agreement may be a charitable entity with a conservation purpose holding IRS 501(c)(3) tax status and registered with the Pennsylvania Bureau of Charitable Organizations (such as many “land trusts”, “watershed associations” or “conservancies”). Or the Holder may be a governmental body such as a county conservation district.

The Right Tool?

The Protection Agreement, also known as a *conservation easement* or *conservation servitude*, can be an appropriate tool to protect natural resources when it is necessary or desirable to keep the land in a private landowner’s ownership and control. If a conservation organization wants to manage the land in a significant way or to have substantial access to and use of the property, then acquisition of the land itself should be considered.

The Right Model?

The Protection Agreement is tailored specifically for where:

- The goal is to protect a relatively narrow ribbon of land along a waterway or lake for the purposes stated above; and
- The landowner is donating the conservation servitude, or the conservation organization is paying no more than a nominal amount for the conservation servitude; and
- The landowner is not seeking a charitable tax deduction on his or her federal income taxes for donation of the conservation servitude.

Presumably, the riparian buffers will most often comprise lands of severely limited development potential due to periodic flooding. The acreages to be restricted will most often be small due to the narrow width of the buffers. Consequently, the potential tax deduction (which generally equals the value of the development rights given up) may very well be less than the costs of securing the appraisal and other services needed for substantiating a federal tax deduction.

If the conservation situation is not as described in the above three points, then users should consider as an alternative base model the *Pennsylvania Conservation Easement & Commentary* available at conserveland.org.¹

General Instructions

- Users of the Protection Agreement are encouraged to read through the commentary at least once. The commentary follows the same Article and Section structure as the easement to make cross-referencing easy. To address different situations, the commentary often suggests alternative language to that found in the model. The commentary also explains the purposes behind many provisions.
- The Protection Agreement and this commentary should not be construed or relied upon as legal advice or legal opinion on any specific facts or circumstances. The Protection Agreement must be revised to reflect the specific circumstances of the particular conservation project under the guidance of legal counsel.
- Standard 9. Practice A. of the 2004 edition of *Land Trust Standards & Practices* published by the Land Trust Alliance (hereafter referred to in this commentary as S&P) requires the land trust to obtain legal review of every land and easement transaction, appropriate to its complexity, by an attorney experienced in real estate law.
- In the following commentary, titles in bold preceded by numbers refer to sections of the same title in the Protection Agreement. Bullets preceding text indicate a comment. Text without bullets varies with the context, covering alternative text to add to the Protection Agreement and extracts from other documents.
- Check conserveland.org periodically for updates to the Protection Agreement and commentary pertaining to the Protection Agreement.

Preliminary Matters

Margins

- Several counties (Montgomery and Chester, for example) require a minimum 3-inch margin at the top of the first page of any document presented for recording and 1-inch margins on the left, right and bottom margins. (However, page numbers may be less than an inch from page bottom.) Many counties require that documents presented for recording must be printed on 8.5 inch by 11 inch paper. Many counties require type size not less than 10-point. The model has been formatted to conform to these requirements.

¹ If users seek to protect land beyond a relatively narrow riparian area or seek to establish multiple protection levels with substantially differing restrictions to address varying conservation objectives within a property, then the Pennsylvania Conservation Easement could be better suited to the task. If the economic value being given up is high, and the landowner wishes to pursue a federal tax deduction, then it is best if users either use the Pennsylvania Conservation Easement, which is specifically designed to meet IRS requirements, or very carefully incorporate the needed provisions into the riparian buffer model. If the conservation organization is paying the landowner a substantial sum for the conservation easement, then users should consider using the Pennsylvania Conservation Easement, which offers the landowner and purchaser more protections than are contained in the Riparian Buffer Conservation Easement.

Header

- In the final version of a document prepared using the model Protection Agreement as the base, it is good practice to remove the header “Revised through: [date].” In MS Word, click on *View*, then *Header and Footer*, delete the phrase and close.

Title of Document

- The document has been labeled a “Protection Agreement” because we believe that landowners will respond more favorably to it than the traditional alternative. It has been a common but not universal practice to use the term “conservation easement” to refer to the restrictive covenants and right to enforce the restrictive covenants contained in the Protection Agreement. However, there is growing momentum in the land trust community to use a more marketable term, such as Protection Agreement. To quote Public Opinion Strategies and Fairbank, Maslin, Maullin & Associates in a 6/1/04 memo to The Nature Conservancy and the Trust for Public Land:

Our research demonstrates clearly and unequivocally that the language the environmental community has been using on this issue has NOT been helpful in positioning the issue with the public. Instead, we recommend the following: DO NOT say “conservation easement.” DO say “land preservation agreements” or “land protection agreements.” ... The focus groups demonstrate that “easements” itself is NOT a positive term. It tends to evoke being forced into doing (or not doing) something with part of your land. In focus groups, the word “easements” made them think of restrictions on their property when they purchased a home or land.

- The term “conservation easement” causes immediate confusion and misconception. People fear that if a conservation easement is granted, the Holder (and perhaps the public) will have a continuing right of way over the property to enter at will and/or actively use the property. Most people, *lawyers and non-lawyers alike*, are unfamiliar with the concept of a “negative” easement – the right to compel an owner *not* to do something on his property. The vast majority of easements (other than conservation easements) grant affirmative rights of way to travel over or to maintain improvements on the property of another.
- The Restatement of Servitudes (Third) (a recently published summary of legal principles recommended by respected authorities) uses the term “conservation servitude” rather than conservation easement. The term “servitude” is an umbrella term for all types of promises that are binding on future landowners as well as the landowner making the promises. So both easements and restrictive covenants are included within a single concept. However, while many legal professionals may more quickly grasp the workings of the conservation tool if the term “conservation servitude” is used, the term seems unlikely to resonate with landowners. Hence, while “conservation servitude” is used in the commentary, it is generally avoided in the Protection Agreement itself.

Opening Recital

- **Purpose.** The purpose of the opening recital is to identify the parties to the document and the effective date of the document.

Agreement Date

- The date can be added in hand writing at the time of signing.
- The date should not be earlier than the date of the earliest acknowledgment (notary signature) attached to document. In situations in which the document is being signed earlier than the desired effective date (for example, because it is being delivered into escrow pre-closing), substitute for “dated as of ____”: “signed _____ but delivered _____”. The date of delivery is the effective “Agreement Date”.

Undersigned Owner or Owners

- Insert names exactly as set forth in the deed by which the Owners acquired the Property. If there has been a change (for example, by death) in the ownership from the names on the deed into the Owners, it is good practice to recite the off-record facts to clear up the apparent gap in title. The

customary practice is to recite these facts either in the Background section or at the end of the legal description attached as Exhibit "A".

- The relationship of multiple Owners to each other may be added here but is not necessary for recording or other purposes. Example: X and Y, husband and wife or X and Y, as joint tenants with rights of survivorship.
- If a Person other than an individual is granting the conservation servitude, a phrase identifying the type of entity and state in which the Person was created is desirable but not necessary for recording or other purposes. Example: X, a Pennsylvania limited partnership.
- If a provision is intended to apply only to the Person signing the Protection Agreement, the phrase "the undersigned Owner or Owners" is used. In all other cases, the term "Owners" (always plural) is used. This arrangement of setting apart the undersigned Owner or Owners from all Owners present and future also has the practical advantage of not requiring conversion of plural to singular or vice versa throughout the document depending upon whether one or more than one persons signed the document.

Holder

- The full legal name of the Holder (including Inc. or Incorporated if part of the legal name) should be inserted here.
- A phrase identifying the type of entity and state in which the Holder was created is desirable but not necessary for recording or other purposes. Example: X, a Pennsylvania non-profit corporation.

Article I. Background

- **Purpose.** The purposes of Article I "Background" are to inform the reader of the factual information necessary to understand the subject matter of the document and the intentions of the parties in entering into a legally binding relationship. The material in the Background section should never be used to set forth enforceable restrictions on the Property.
- **Articles and Sections.** The model has been structured in Articles and Sections rather than a list of paragraphs. There are several practical reasons for this. One reason is to encourage additional provisions to be clustered with similar provisions instead of adding them to the end where they may be missed in a quick review. Another reason is to avoid wherever possible cross-references to specific paragraphs. A common drafting error is to add or delete paragraphs and not check whether cross-references are still correct. This structure seeks to minimize the opportunities for that error to occur.

1.01 Property

- **Purpose.** The purpose of this Section is to identify the land affected by this Protection Agreement.

Street Address:	Insert a street address if available; otherwise, try to identify by acreage and frontage along a certain road or roads. Example: 100 acres more or less north side of ___ Road west of the intersection of ___ Road and ___ Road.
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Municipality:	Insert the city, township or borough in which the Property is located. This may or may not be the name of the town used for mailing address purposes.
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County:	Identification of the county is required for recording purposes. If the Property is located in more than one county, it is important to have multiple originals signed so as to permit recording to occur simultaneously in both counties.
Parcel Identifier:	The Tax Parcel Identification number for the Property is required for recording in most if not all counties. Some counties also require a Uniform Parcel Identification number. <i>See</i> Uniform Parcel Identifier Law (21 Pa. Stat. §§331-337). Some counties charge additional recording fees to note the tax parcel number and/or uniform parcel identifier number on the document presented for recording if not furnished in the document itself or the legal description attached as Exhibit "A".

1.02 Purpose

- **Purpose.** This Section serves a number of important purposes. First and most obvious is that it sets out the intentions of the parties with respect to the conservation of the Riparian Buffer. Second it is intended as an educational tool for future Owners. Third, it will serve as a guide for future amendment: there may be perfectly acceptable alternative means to achieve the same ends. Fourth, if the Protection Agreement becomes the subject of litigation, it will help inform the court of the rationale underpinning particular covenants.

(a) Conservation Objectives

- Substitute "Stream", "River" or "Lake" as appropriate for "Creek" by universal change throughout the document.
- If all or portions of the land to be protected are naturally incapable of supporting forest but can support ecologically important habitat, then alter the Conservation Objectives as appropriate. (Also, remove "Forest" from the title of the document if appropriate.) For example:
 - to maintain and improve the quality of water resources associated with the Creek; to perpetuate and foster the growth of healthy forest, shrub land or other biological communities as would be naturally found with the Riparian Buffer; to preserve habitat for Native Species dependent on water resources, forest or other natural habitat; ...

(b) Riparian Buffer Area

- The Protection Agreement defines the Riparian Buffer as: (i) the strips of land stretching ___ feet landward from the Top of Banks of the Creek, (ii) the banks of the Creek, and (iii) the bed of the Creek. The definition goes on to limit this area to that portion actually contained within the Property.
- This approach enables users to use the same definition whether the Owner owns one side of the stream or both sides.
- This description creates a Riparian Buffer that moves with the stream if the stream should meander. This supports a key purpose of the Protection Agreement – to protect the stream's water resources – wherever the stream may be at any particular time.
- The alternative to a moveable Riparian Buffer is to describe the Riparian Buffer as a fixed location permanently marked on the ground. The fixed location may be less desirable because (i) the water resources would likely receive less effective protection if the stream meandered; and (ii) the fixed location would have to be described in accordance with a metes and bounds survey to conform to

the requirements of the Pennsylvania Conservation Easements Act which would result in additional expense.

- Another alternative is to establish the Riparian Buffer as a uniform width measured from the centerline of the stream. This has the advantage of being simple to state in writing. However, with this approach a wider section of stream would receive less protection than a narrower section since a portion of the uniform buffer width includes the streambed, and less buffer is actually established as compared to a buffer measured from the bank with the same nominal buffer width. Also, measuring a buffer from a stream centerline can be more challenging in the field than from the Top of the Bank.
- A stream may meander off the Owners' property. In that case, whether the Riparian Buffer was fixed or moveable, measured from bank or centerline, the Holder would not be able to require compliance with the Protection Agreement as applied to areas outside the Property.
- The description of the Riparian Buffer might also reference a boundary established by another public document such as a 50-year or 100-year flood plain. A key challenge with this approach is translating a boundary on a map into markings on the ground.
- The width of the strips of land stretching landward from the Top of Banks of the Creek (i.e., the blank to be completed in §1.02(b)) may be any width but should be as wide as is acceptable to the Owner who enters into the Protection Agreement and, in any event, not less than thirty-five (35) feet. The 35-foot minimum is consistent with the minimum width for riparian forest buffer required under the Conservation Reserve Program originally authorized under the Food Security Act of 1985 and regulations promulgated under that act set forth in Title 7 of the Code of Federal Regulations Part 1410 ("CRP") and the Conservation Resource Enhancement Program, 16 U.S.C.S. §3831 *et seq.* ("CREP"). See also the recommendations in *Riparian Forest Buffers* (Welsch, 1991), Forest Resources Management, USDA Forest Service, Radnor, PA, NA-PR-07-91, available on-line at www.na.fs.fed.us/spfo/pubs/n_resource/riparianforests/Tab%20II.htm.
- A description of the Riparian Buffer by means of a setback from a stream bank conforms to the requirements of §4(b) of the Pennsylvania Conservation and Preservation Easements Act, Act 29 of 2001, Pub. L. No. 330 set forth below. Otherwise, a metes and bounds description is required if the Riparian Buffer is less than the entirety of the Property.

[A] conservation easement may encompass an entire fee simple interest in a parcel of real property as described in the deed to the property, or any portion thereof or estate therein. Except when referencing an easement's boundary using setback descriptions from existing deed boundaries or natural or artificial features, such as streams, rivers or railroad rights-of-way, a metes and bounds description of the portion of property subject to the easement shall be provided in the easement document.

- In most cases, it is expected that parties should be able to reasonably agree to the location of the Top of the Bank. However, in case of ambiguous, indefinite or nonexistent floodplain or question regarding location, the model's approach provides science-based instructions for determining Top of the Bank to be found in the definition of Top of the Bank in Article VII.

(c) Baseline Documentation

- The Baseline Documentation is intended to serve as an objective information baseline for monitoring compliance with the terms of the Protection Agreement. Among other information describing and depicting the Stream and the vegetative and other resources to be found within the Riparian Buffer, the Baseline Documentation should include photographs identifying the location of the Stream as of the Agreement Date. The Baseline Documentation is incorporated into the text of the Protection Agreement under §6.10 even though it is not attached to the recorded documentation. Because it is not attached to the recorded document, it is imperative that the definitive baseline report be signed by the undersigned Owners and the Holder with a notation identifying the report as the Baseline Documentation referred to in the Protection Agreement between Owners and the Holder dated ____.

1.03 Owners' Control

Applicable rules of law provide that, except for rights specifically granted, all other rights pertaining to the ownership of land remain vested in the Owners. This provision is intended to provide comfort to Owners that they are not relinquishing any control over their Property except as specifically set forth in Articles II and III and they are not granting any rights of access except to the Holder for monitoring purposes as set forth in Article IV.

1.04 Defined Terms

The purpose of this Section is to direct the reader to Article VII for the definitions of other terms used in this Protection Agreement.

Additional Provision, if applicable: The following section may be added to Article I if Owners receive payment for the grant of the Protection Agreement:

1.05 Purchase Price

In consideration of the grant of this conservation servitude, Holder has paid to the undersigned Owner or Owners the sum of \$ _____ (the "Purchase Price"). The undersigned Owner or Owners acknowledge receipt of payment in full of the Purchase Price.

Additional Provision, if applicable: The following section title could be added to Article I along with other text as indicated below if Owners intend to seek a federal tax deduction for the grant of the Protection Agreement:

1.06 Charitable Contribution

- The model Protection Agreement must be adapted if the Owners intend to seek a charitable deduction on their federal income tax return for donating to Holder the rights to enforce the Protection Agreement. If Owners desire to claim a charitable contribution for the grant of the conservation servitude, consider using the Pennsylvania Conservation Easement (available at conserveland.org) as the base document. Alternatively, amend the Protection Agreement to include those provisions of the Pennsylvania Conservation Easement required to qualify the grant as a charitable contribution; for example, those set forth in Article I entitled "Charitable Contribution" of the Pennsylvania Conservation Easement. Owners and their counsel are also advised to review the commentary accompanying the Pennsylvania Conservation Easement for the requirements that apply to charitable deductions of Qualified Conservation Contributions under §170(h) of the Internal Revenue Code.

Article II. Restrictive Covenants: Improvements

- **Purpose.** The purpose of this Article is to control the size and location of Improvements within the Riparian Buffer consistent with Conservation Objectives.
- The Article begins with a broad prohibition on Improvements to assure that the list of permitted items comprises the universe of Improvements permitted within the Riparian Buffer.

2.01 Existing Improvements

- Existing Improvements within the Riparian Buffer are always permitted to remain in their existing locations as of the Agreement Date.

2.02 Additional Improvements

(a) Existing Agreements

- Existing Agreements are entitled to priority over the Protection Agreement under Applicable Law so there is no point in trying to control the exercise of those rights by persons who are not a party to the Protection Agreement.
- The model can be used in conjunction with existing CRP and CREP agreements.

(b) Other Additional Improvements

- The phrase “subject to Review” may be added to subsections (i) and/or (ii) if the undersigned Owners and Holder desire Holder to exercise rights of Review prior to commencement of Construction of the items permitted in those subsections.
- The list may be expanded; however, Additional Improvements within the Riparian Buffer should be limited to those that the Holder has determined are consistent with Conservation Objectives for conservation of this ecologically sensitive area.
- The model is constructed with a very limited list of Additional Improvements. Because the list of items is so limited, additional limitations such as impervious coverage limitations were not considered necessary. However, if the list in this section is expanded to include items with the potential for significant Impervious Coverage, then a “Limitations on Additional Improvements” section should be added. See, for example, limitations provided in the Pennsylvania Conservation Easement applicable to Improvements within the Standard Protection Area.
- Additional limitations may be imposed on trails. Trails may be limited to a relatively narrow width (such as 4-6 feet). On the other hand, a wider path (particularly when used as a bridle path) may be less likely to become rutted.
- The reference to “highly porous” in §2.02(b)(ii) includes paths covered by gravel, stone or wood chips.

Article III. Restrictive Covenants: Activities; Uses; Disturbance of Resources

- Purpose.** The purpose of this Section is to control intensity of use of land and disturbance of natural resources identified in the Conservation Objectives.
- The Protection Agreement does not create affirmative obligations on the Owners to perform any particular resource management activities. Accordingly, Holders are encouraged to educate Owners as to appropriate activities to enhance forest buffers.

3.01 Existing Agreements

- Activities, uses and disturbances of resources that a Person has a right to do under an Existing Agreement are permitted as a matter of right anywhere within the Property. Land trusts should obtain title information to determine what rights Persons have to disturb natural resources within the Property by exercise of rights under Existing Agreements.

3.02 Other Activities and Uses

- Purpose.** The purpose of this section is to describe those activities that are consistent with protection of water resources and other Conservation Objectives for the Riparian Buffer.
- (a) Disturbance of Resources**
 - Hazardous Conditions.** The provision in subsection (i) is intended to shield the Holder from liability for personal injury or property damage occurring on or about the Property by trees limbs falling or similar hazards. Holders who are concerned that this provision creates a loophole for

Andrew Loza 11/17/05 4:21 PM
Comment: In our last conference call, reference was made to a DEP toolkit and to MD’s resources. We couldn’t find these resources on the web. Ask Derrick on 11/21 for the specific name and location at www.dep.state.pa.us

unwarranted interference with trees and other resources should consult with their legal counsel and insurance representatives before changing the provision.

- **Review.** Except for the provision pertaining to hazardous conditions in subsection (i) (which should be permitted without Review to avoid liability), Holders may use their discretion whether or not they want to condition other activities on “subject to Review”.
- (b) Nature Preserve and Trail Uses**
- Owners should be aware that permitting hunting, fishing and other uses listed in this paragraph does not mean that public access must be given for these purposes. If Owners and Holder desire to establish an easement or license vesting a public right of access for these activities, they must either do so by separate agreement or by adding a section to Article IV granting public access. *See* commentary to Article V of the Pennsylvania Conservation Easement re: “Grant of Public Access”.
 - The Holder may use its discretion to expand the list of permitted activities to include others – such as horseback riding and biking – that may or may not have the potential to materially and adversely affect Conservation Objectives applicable to the particular Riparian Buffer.

Article IV. Rights and Duties of Holder and Beneficiaries

4.01 Grant to Holder

- **Purpose.** This section describes the necessary conditions to create a legally binding conveyance of an interest in real property whether or not consideration is present.
- **Unconditional.** The grant to the Holder must be unconditional. Conditional delivery is not sufficient; for example, if a signed document is delivered in escrow to a third party (a title company, for example) the document is not effective until released from escrow.
- **Perpetual.** The model has been constructed to extend for a perpetual term the protection given to a Riparian Buffer for a term of years under CRP or CREP.
- **Recording.** Recording in the Public Records is necessary to make the covenants binding upon future owners who do not otherwise know about the terms of the Protection Agreement but the grant is complete once the document is signed and unconditionally delivered.
- **Consideration.** The phrase “intending to be legally bound” is a valid substitute for consideration (that means it makes a promise to make a gift as enforceable as other contracts) under the Uniform Written Obligations Act, 33 Pa. Stat. §6.
- **Grant and Convey.** The words “grant and convey” have a special meaning in real estate law. When an Owner grants and conveys that automatically means that the Owner warrants that he or she owns the property (or interest in the property) being conveyed in fee simple and has a right to convey the property.
- **Conservation Servitude.** According to the Restatement (Third) of Servitudes, a “conservation servitude” is a servitude for conservation purposes. A servitude is promise that is binding upon future owners of the property. Conservation purposes include retaining or protecting the natural, scenic or open-space value of land, assuring the availability of land for agricultural, forest, recreational or open-space use, protecting natural resources, including plant and wildlife habitats and ecosystems, and maintaining or enhancing air or water quality or supply.
- **Subordination of Liens.** Subordination of any Lien affecting the Property as of the Agreement Date is important because Holder needs assurance that the Protection Agreement could not be extinguished by foreclosure of a Lien prior in right to the Protection Agreement.

4.02 Rights and Duties of Holder

- **Standard of Care.** Note that in this section the Holder not only has the right but also the obligation to perform the tasks listed in §4.02. Whenever a Person owes a duty to another, the Person has the obligation to perform the duty in good faith and with a standard of care that a reasonably prudent person would use. The following section (§4.03) lists rights that the Holder may but is not obligated to perform.

4.03 Other Rights of Holder

- **Purpose.** To give the Holder the right and power to perform at its election, the discretionary powers identified in this section.
- (a) **Amendment**
- **Policy for Amendment.** The Pennsylvania Land Trust Association (“PALTA”) urges Holders to formulate and adopt a policy on amendment. PALTA intends to publish at conserveland.org examples of amendment policies adopted by land trusts in Pennsylvania. For an explanation of private benefit rules, refer to §501(c)(3) of the Internal Revenue Code and associated regulations.
- (b) **Signs**
- **Project Identification.** Installing signage may benefit the Holder in several ways. First, signs bring to the attention of the public the benefits of conservation of riparian buffer. Second, signs provide notice to a prospective purchaser, lessee or other user of the Property of the interest of the Holder. It then becomes their responsibility to inquire about the terms of the Protection Agreement.
 - **Public Access.** Rights to install trail signage may need to be added if it is expected that Owners may someday grant a right of public access to the Riparian Buffer.

Pat Pregmon 11/1/05 10:55 AM

Comment: Did not use DWG suggestion here – policy on amendments is not derived from IRC but from good practice including S&P

4.04 Review

- **Purpose.** The purpose of this section is to provide the procedure for Review as and when Review is required under Articles II and III.
- (a) **Notice to the Holder**
- This provision contains the procedural requirements to initiate the Review process.
 - If the Holder has adopted a specific set of minimum criteria for submission, then this provision should be modified to substitute following after “including with the notice”: “the items required for such submission under the Review Requirements of the Holder”. The definition of “Review Requirements” in Article VIII accommodates two approaches – the Review Requirements can be simply included in the Baseline Documentation or can also be attached as an Exhibit to the Protection Agreement. In either case, the definition incorporates changes to the Review Requirements over time.
- (b) **Notice to Owners**
- Among the four possible responses to Owners’ request for Review is rejection of Owners’ proposal for insufficiency of information on which to base the Holder’s decision. This alternative is included so as to avoid the need to incorporate detailed Review Requirements into the Protection Agreement and to give the Holder a reasonable opportunity to determine whether or not additional information is needed to give a definitive response to Owners’ proposal.
- (c) **Failure to Notify**
- This subsection sets forth the consequences of the Holder’s failure to respond in a timely way. An alternative to extending the time in subsection (b) above to 45, 60 or 90 days is to reverse the “deemed approved” to “deemed disapproved.” The rationale for this reversal is that it provides an incentive to Owners to contact the Holder before the running of the 30-days to be sure the Holder has received all of the information the Holder needs to make the decision. It is also more likely

that, if additional time is needed to make the decision, it is to the benefit of Owners to grant the extension.

(d) Standard of Reasonableness

- The approach taken by the model is to require the Holder to act reasonably in discharging its duty to Review. The rationale for this approach is that courts are unlikely to sustain a “sole and arbitrary standard”. However, to avoid the risk that a court might hold the Holder to a standard of commercial reasonableness, the model provides a standard of “ecological reasonableness”.

4.05 Beneficiaries

- **Purpose.** The purpose of this section is to describe one or more Beneficiaries who are intended to have rights to exercise Holder’s rights if the Holder should fail in its duties. Alternatively, one or more Beneficiaries could be granted additional rights. For example:

The _____ Conservation District has the following rights as Beneficiary of this Protection Agreement: (i) the right to exercise Holder’s rights and duties under this Protection Agreement should Holder fail to uphold and enforce in perpetuity the restrictions under this Protection Agreement; (ii) the right to approve any transfer of Holder’s rights under this Protection Agreement; and (iii) the right to approve any amendment of this Protection Agreement.

Additional Provision, if applicable: The following section may be added to Article IV to help the Holder cover costs in discharging its duties with respect to the Protection Agreement. This provision is particularly important if the Holder has not secured sufficient stewardship funding to cover all costs likely to be incurred as a result of holding the Protection Agreement.

4.06 Reimbursement

Owners must reimburse Holder for the costs and expenses of Holder reasonably incurred in the course of performing its duties with respect to this Protection Agreement other than monitoring in the ordinary course. These costs and expenses include the allocated costs of employees of Holder.

- This provision correlates the obligation of Owners to reimburse with the obligations of the Holder to enforce, inspect, review and interpret under §4.02. Note that expenses under §4.03(a) entitled “Amendment” are not automatically covered. These should be handled as part of the amendment agreement.

Article V. Violation; Remedies

5.01 Breach of Duty

- **Purpose.** The purpose of this provision is to ensure that the Protection Agreement will be enforceable in perpetuity.

5.02 Violation of Protection Agreement

- **Purpose.** This section sets forth the procedure for enforcement of the Protection Agreement.
- **Persons Responsible.** Do not alter this provision to create a connection between the violation and some act or failure to act by Owners. A violation is a violation whether or not caused by Owners. Tenants, invitees and trespassers can violate the restrictive covenants set forth in the Protection Agreement. It is up to Owners to maintain control over the Property; however the section titled “No Fault of Owners” under this Article should give Owners comfort that they will not be unreasonably held responsible for the acts of others.

(a) Notice

- **Purpose.** This provision is to give Owners some comfort that, before they are exposed to monetary damages or other remedies, they will be given notice and opportunity to cure the violation. See Article VI for requirements applicable to notices.

(b) Opportunity to Cure

- **Purpose.** The approach taken by the model is to provide a reasonable period to cure if, within the initial 30-day period, there is a meeting of the minds between Owners and the Holder as to what constitutes a reasonable cure and what constitutes a reasonable period of time to effectuate that cure.

(c) Imminent Harm

- **Purpose.** If the Holder becomes aware of a prohibited activity that will destroy protected resources, the Holder cannot delay obtaining a court order to cease the activity. For example, if the violation is tree cutting, the trees will be gone by the time the cure period expires.
- **Consultation.** On the other hand, Owners frequently want some kind of notice before they become responsible for Litigation Expenses incurred by the Holder based on an alleged violation. If that is an issue, the Holder can consider adding a statement to the effect that the Holder will endeavor to communicate or consult with Owners regarding the alleged violation prior to commencement of remedies. Do not use the words “notice” or “notify” because that will require written notice given in accordance with Article VI. Consulting or communicating with Owners can be accomplished via a telephone call.

5.03 Remedies

- **Purpose.** The purpose of this section is to describe the specific remedies that the undersigned Owners and the Holder agree are appropriate if a violation should occur in the future.
- **Enforceability of Waivers.** Drafters of conservation servitudes need to keep in mind that not all promises of the undersigned Owners are binding upon future Owners of the Property who did not, themselves, make the promise. The rule developed by case law over many centuries required that the promise had to be about something pertaining to the land itself. For example, the restrictive covenants in Articles II and III are unquestionably binding upon future Owners. On the other hand, it is highly questionable whether a court would enforce against future Owners waivers of procedural or constitutional rights just because the undersigned Owner was willing to do so.
- **Due Process of Law.** The approach taken by the model is to include only those remedial provisions that a court would be willing to enforce against all Owners and that do not purport to waive the constitutional rights of Owners to notice, opportunity to be heard, to have the dispute determined by a court before a jury and any other constitutionally protected right of due process of law.
- **Arbitration; Mediation.** Provisions for arbitration and/or mediation are sometimes added to conservation servitudes; however, it is doubtful that the undersigned Owner can waive the constitutional right of future Owners to a trial by jury so requirements for mandatory arbitration or mediation may be of limited usefulness in a conservation easement. Holders who want to insert provisions for arbitration or mediation should consult with counsel and choose an effective and enforceable provision. For information on arbitration and mediation, consult the website of the American Arbitration Association (www.adr.org) which provides a “Practical Guide to Drafting Dispute Resolution Clauses”.

(a) Coercive Relief

- **Purpose.** Relief in the nature of a court order forcing a Person to do or refrain from doing certain activity is a special remedy that under Applicable Law usually requires a showing that other relief will not suffice to make the Person harmed by the activity whole.
- **Restatement.** The Restatement (Third) of Servitudes recommends special treatment for a conservation servitude held by a governmental body or a conservation organization: it is

enforceable by coercive remedies and other relief designed to give full effect to the purposes of the servitude without the showing otherwise required under Applicable Law.

(b) Civil Action

- This remedy is intended to furnish the Holder with a judgment for a specific sum of money that the Holder is entitled to collect from Owners. The judgment automatically creates a lien on the real property of Owners in the county in which the judgment is entered and can be enforced against any assets of Owners. The amount of the judgment will be set by the court in the reasonable amount necessary to compensate the Holder for Losses, Litigation Expenses and other sums owing by Owners under the Protection Agreement.

(c) Self-Help

- Many Holders will want the power to enter the Property so as to stop a violation while a court order is being sought to restrain further activity. Holders are urged to consult with counsel and, if circumstances suggest that the entry is unwelcome, consider requesting police escort. The power of self-help should be used only if the entry can be made without violence and without harm to persons or property.

5.04 Remedies Cumulative

- **Purpose.** The purpose of this provision is to negate the presumption under Applicable Law that once a Person chooses a particular remedy, the Person has made his election and cannot choose others or pursue more than one remedy at the same time.

5.05 No Waiver

- **Purpose.** If a violation of the Conservation Easement occurs and the Holder doesn't notice it or for some reason ignores it, a court could refuse to use its power to require correction of the violation if the court found that, under the circumstances, strict enforcement would be unfair or unjust to Owners. The purpose of this provision is to avoid application of that rule.

5.06 No Fault of Owners

- **Purpose.** This provision is intended to give some comfort to Owners that they will not be held responsible for the acts of others.
- **Burden of Proof.** The provision is specifically worded to avoid imposing on the Holder the burden of proving that a particular violation was the fault of Owners and no one else.

5.07 Continuing Liability

- **Purpose.** Many forms have a requirement for prior notice of a transfer but there is really no remedy if the transferring Owner fails to do so. This provision is intended to provide a compelling incentive for the Owners to obtain a certificate of compliance prior to a transfer.

Article VI. Miscellaneous

- **Purpose.** The purpose of this Article is to group together a variety of provisions pertaining to both Owners and the Holder or pertaining to the administration or interpretation of the Protection Agreement.

6.01 Notices

- The purpose of this Section is to provide a procedure for the giving of formal notices under the Protection Agreement.

(a) Form of Notices

- Electronic mail and telefax can be added as well if the Holder is confident these means of communication will be duly noted. The customary practice is to require that notices by these means be followed promptly by notice delivered by one of the methods listed above.

Pat Pregmon 11/1/05 10:55 AM
Comment: Did not use DWG comment re "traditional" methods.

(b) Address for Notices

- A street address should be furnished as commercial couriers (such as FedEx or UPS) cannot deliver to P.O. Boxes.

6.02 Governing Law

- In case the undersigned Owner or a future Owner is an out-of-state resident, this provision makes it clear that only the laws of the Commonwealth of Pennsylvania apply. This avoids a dispute about whether the laws of another jurisdiction or the choice of law rules of the Commonwealth of Pennsylvania apply.

6.03 Binding Agreement

- **Purpose.** To set forth the understanding of Owners and the Holder that the Protection Agreement is not just the agreement of the undersigned Persons but binds and benefits all Persons who succeed to their respective interests.

6.04 Amendments, Waivers

- **Purpose.** This provision has several purposes. First, it puts Owners on notice that they should never rely on an oral statement of an employee or other representative of the Holder that is contradictory to the terms of the Protection Agreement. Second, it puts Holders on notice of their need to inform staff or other Persons performing monitoring or administrative duties of the limits of their authority.
- **Authorization.** Holders need to establish what authorization is needed for amendments, waivers or consents.
- **Amendment.** Ordinarily, an amendment needs to be approved by the Board or other governance committee that approves acceptance of the Protection Agreement. An amendment is signed with all of the formalities required of the original Protection Agreement and is intended to be recorded in the Public Records. An amendment permanently changes the terms of the Protection Agreement.
- **Consent or Waiver.** A discretionary consent or waiver (even if in writing) does not constitute an amendment. It is granted for a particular purpose and only for a limited time due to extraordinary circumstances not contemplated under the Protection Agreement. For example, a forest fire or extended drought may necessitate Owners taking extraordinary measures not specifically permitted under the terms of the Protection Agreement. The terms of the Protection Agreement remain unchanged but the Holder waives its right to invoke its remedies under Article V. A consent or waiver should always be memorialized in writing but it can simply be a letter from the Holder to Owners in response to a written request from Owners to the Holder requesting a waiver to permit specified activities for a specific period of time.

6.05 Severability

- **Purpose.** If the provisions of a document are dependent on each other, then if one fails they all fail. The provision set forth in this section is intended to avoid application of that rule – if one provision fails (for example, the Holder is not permitted a self-help remedy under Applicable Law) the others remain in full force.

6.06 Counterparts

- **Purpose.** There are several purposes for this provision. First, it makes clear that more than one counterpart of the Protection Agreement can be signed. Second, it allows the undersigned Owners and Holder to exchange signature pages signed separately rather than circulate original documents back and forth to collect necessary signatures.

6.07 Indemnity

- **Purpose.** The Riparian Buffer is not in the care, custody or control of the Holder. The Holder needs to be protected from claims that are the responsibility of the Owners in the first place so that Owners (or their insurer) will defend those claims without the need for the Holder to furnish its own defense and incur Litigation Expenses.

- Among other liabilities under Applicable Law, this provision is intended to avoid Litigation Expenses in case the Holder is named as a potentially responsible party with respect to an alleged violation of environmental laws on or about the Property.
- This provision is intended to place the burden for defense of claims ordinarily covered by homeowners insurance on the Owners and their insurer.

6.08 Guides to Interpretation

- The provisions of this section are intended to assist future readers of the document to interpret it correctly.
 - (a) Captions**
 - This provision is self-explanatory; however, drafters need to be aware of the consequences of falling afoul of this provision. You cannot rely on a caption to convey meanings that are not in the text itself.
 - (b) Terms**
 - These provisions avoid needless repetition of phrases.
 - (c) Conservation and Preservation Easements Act**
 - The purpose of this paragraph is to state the intention of the undersigned Owners to grant to the Holder all rights, powers and privileges accorded to the holder of a conservation easement under Applicable Law.
 - (d) Restatement of Servitudes**
 - The purpose of this paragraph is to increase the likelihood that a court interpreting this Protection Agreement, should there be any doubt as to the correct interpretation of a provision, will look to the Restatement of Servitudes as the better view of the law applicable to conservation servitudes. *See Pregmon, Patricia L. "How Changes in the Law of Servitudes Affect Conservation Easements", Exchange: The National Journal of Land Conservation, Vol. 24, No. 2, pp. 27-28.*

6.09 Entire Agreement

- The written text of the Protection Agreement signed by Owners and the Holder is final and definitive. Whatever was proposed in previous drafts and said in previous negotiations is of no further consequence in interpreting the intentions of the parties.

6.10 Incorporation by Reference

- The provision serves several purposes (1) it avoids needless repetition of phrases; and (2) it serves as a handy list to check which Exhibits need to be attached to the document.
- The Baseline Documentation is incorporated into the text of the Protection Agreement here even though it is not attached to the recorded documentation. Because it is not attached to the recorded document, it is imperative that the definitive baseline report be signed by the undersigned Owners and the Holder with a notation identifying the report as the Baseline Documentation referred to in the Protection Agreement between Owners and the Holder dated ____.

6.11 Coal Rights Notice

- This statement is required for compliance with §9(d) of the Conservation and Preservation Easements Act. The notice has been formatted to comply with the requirements of that Act – at least 12-point type and preceded by the word "Notice" in at least 24-point type.

Article VII. Glossary

- **Purpose.** The purpose of this Article is to keep all defined terms in one Article for convenience of reference. All initially capitalized terms not defined in Article I should be defined in the Glossary not in the body of the Protection Agreement. Occasionally, exceptions to this rule are appropriate and, in that case, cross-reference the definition in the Glossary.

7.01 Additional Improvements

- See commentary to Article II.

7.02 Applicable Law

- This definition is intended to incorporate changes in law over time. For example, if the question of compliance arises in 2020, the reference is to Applicable Law at that time (not the Agreement Date).

7.03 Beneficiary or Beneficiaries

- See commentary to §4.06.

7.04 Construction

- Note that the definition of Construction encompasses a variety of activities that go beyond construction of Improvements.

7.05 Existing Agreements

- See commentary §3.02(b). PALTA recommends obtaining appropriate title information to identify Existing Agreements as part of the Baseline Documentation. At a minimum, land trusts should request a copy of Owners' title policy and inquire whether Owners have granted any easements or other servitudes during their period of ownership.

7.06 Existing Improvements

- If there are no Existing Improvements within the Riparian Buffer, substitute the following for the text in the model: "There are no Existing Improvements within the Riparian Buffer as of the Agreement Date".
- If there are only a few Existing Improvements within the Riparian Buffer, substitute a list of them for the text in the model. Example:

Existing Improvements as of the Agreement Date consist of an earthen trail, approximately 4-foot wide, along the south side of the Stream and a wooden pedestrian bridge crossing the Stream.

7.07 Improvement

- The definition provides a collective term to refer to all buildings and structures on the Property whether existing as of the Agreement Date or later constructed.

7.08 Indemnified Parties

- The definition is intended to be sufficiently expansive to cover claims against Persons acting on behalf of the Holder. Nevertheless, PALTA recommends that Holders consult with their insurance carriers to evaluate their coverage under this indemnity.

7.09 Invasive Species

- The source of the definition is Executive Order 13112 authorizing formation of the National Invasive Species Council which coordinates federal responses to the problem of Invasive Species. See www.invasivespecies.gov – the gateway to federal efforts concerning Invasive Species. On this site is information about the impacts of Invasive Species and the federal government's response, as well as profiles of select species and links to agencies and organizations dealing with Invasive Species issues.
- The definition provided in the model applies to plant species only and is, accordingly, more limited than the federal definition. The definition in the model can be expanded, if desired, to include all biota – not just plants.

7.10 Lien

- The definition is used in §5.01 pertaining to the obligation of Owners to obtain and deliver subordinations of Liens existing as of the Agreement Date.

7.11 Litigation Expense

- The definition includes fees incurred in connection with investigation of a violation. Frequently survey fees are required to establish whether or not a violation has occurred. These would be included in Litigation Expenses whether or not litigation has commenced.
- The source of this definition is Stark, Tina, *Negotiating and Drafting Contract Boilerplate*, ALM Publishing 2003. ISBN 1588521052, §10.08(l) (hereafter referred to in this commentary as *Negotiating Boilerplate*).

7.12 Losses

- This definition is intended to encompass the items that may be included in a civil action under §6.03.
- The source of this definition is *Negotiating Boilerplate*.

7.13 Native Species

- This definition may be refined to refer to a specific valley or region if desired by the Holder.
- The source of the definition is the Pennsylvania Department of Conservation and Natural Resources, State Forest Resource Management Plan “*Management of Natural Genetic Diversity in Pennsylvania State Forest Lands*” available online at www.dcnr.state.pa.us/forestry/sfrmp/eco.htm#biodiversity.
- For a listing of plants identified as Native Species in Pennsylvania, see the listing provided by the Pennsylvania Natural Heritage Program available online at www.dcnr.state.pa.us/forestry/pndi.

7.14 Owners

- The defined term is always used in the plural because it refers to all Owners starting with the undersigned Owners and encompassing all future Owners in perpetuity.

7.15 Person

- The definition avoids the need for repetitious phrases.

7.16 Resource Management Plan

- There are many ways to describe a Resource Management Plan. This definition emphasizes that the plan is, in the first instance, prompted by what the Owners want to do on their Property. The RMP is then developed so as to accommodate the Owners’ desires to the extent consistent with and in furtherance of the Conservation Objectives and the terms of the Protection Agreement.

7.17 Review

- See commentary to Article IV.

7.18 Review Requirements

- The definition is intended to incorporate future changes in Review Requirements and incorporate Review Requirements set forth as an Exhibit or included in the Baseline Documentation.

7.19 Top of the Bank

- In most cases, it is expected that parties should be able to reasonably agree to the location of the Top of the Bank. However, in case of ambiguous, indefinite or nonexistent floodplain or question regarding location, the definition provides science-based instructions for determining the location based on delineating the bankfull water elevation.

Closing Matters

- **Closing:** The phrase “INTENDING TO BE LEGALLY BOUND” is especially important in Protection Agreements where there is no consideration being given for the donation of the conservation servitude because the phrase is a valid substitute for consideration in the Commonwealth of Pennsylvania. The term “consideration” means something of value given in return for a promise.

- **Witness/Attest:** It is good practice but not necessary for validity or recording to have a document witnessed or, if a corporation, attested by the secretary or assistant secretary.
- **Signature lines.** Add as many signature lines as are necessary to accommodate the number of Owners and Beneficiaries who will be signing the Conservation Easement. It is good practice to sign in black ink rather than blue ink so that signatures are legible on microfilm or microfiche.
Acceptance. The Conservation and Preservation Easements Act requires Beneficiaries to sign the Protection Agreement (or record a separate document of acceptance) to evidence their acceptance of the rights and duties. However, the acceptance does not have to be made a part of the initial Protection Agreement but can be recorded later if and when the need arises for Beneficiary to enforce its rights under the Protection Agreement independent of the Holder.
- **Acknowledgment.** The date of the acknowledgment should not be earlier than the Agreement Date. *See* commentary to opening recitals of Protection Agreement.
- **Exhibits.** It is very important to check that all exhibits referenced in the Protection Agreement are attached to the Protection Agreement before it is signed and recorded in the Public Records. *See* commentary to §6.10.