

Fishing Access Agreement & Commentary

a model document and guidance

Prepared by the
Pennsylvania Land Trust Association

in partnership with the
Pennsylvania Fish and Boat Commission



and with support from the
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COMMENTARY to the Fishing Access Agreement

Introduction to the Access Agreement

This model Fishing Access Agreement (the “Agreement”) provides a framework for non-profit organizations, the Pennsylvania Fish and Boat Commission (the “Commission”) and other governmental entities to build cooperative relationships with private landowners (called “Owners” in the Agreement) to expand fishing opportunities within lakes, streams, rivers and other waterways within the Commonwealth (any of these is called a “Waterway” in the Agreement) and to ensure good fishing for both residents and visitors to the Commonwealth of Pennsylvania.

The Agreement achieves these objectives while keeping the property in the ownership and control of the Owners.

In the Agreement, the Owners agree that anglers can fish within and along the banks of the Waterway and agree that the banks of the Waterway will remain undeveloped and undisturbed. Where appropriate, the Agreement may also provide anglers with access to the Waterway via an access point on a nearby public road. The Agreement also provides the “Holder” with access to improve the health of the Waterway and the fish that live within the Waterway. The Holder commits to watch over the Waterway and adjoining banks (called the “Riparian Corridor” in the Agreement) and to enforce the restrictions.

The Holder may be a non-profit organization, the Commission or a local government. Participants other than the Holder are identified as Beneficiaries in Article II. Beneficiaries have all of the rights and none of the obligations of the Holder.

General Instructions

- **Read the Commentary.** Users of the Agreement are encouraged to read through the commentary at least once. The purpose of each Section is explained and, oftentimes, variations are provided to address alternatives that may be useful in particular situations.
- **Structure.** The commentary follows the same Article and Section structure as the Agreement to make cross-referencing easy. Titles or captions in bold lettering preceded by numbers refer to sections of the same title in the Agreement. Bullets preceding text indicate a comment. Text without bullets varies with the context, covering alternative or optional text to add as well as excerpts from other documents.
- **Get Legal Counsel.** The Agreement and this commentary should not be construed or relied upon as legal advice or legal opinion on any specific facts or circumstances. The Agreement must be revised to reflect the specific circumstances of the particular project under the guidance of legal counsel.
- **Best Practices.** Any organization considering acquiring land or easements for recreational purposes should be aware of the guidelines contained in *Land Trust Standards & Practices* (referred to in this commentary as “S&P”). See conserveland.org/ltscltsandp_2006.) Last updated by the Land Trust Alliance in 2004, these voluntary standards and practices draw on the decades of experiences and lessons learned by organizations across the country. Standard 9, Practice A calls for land trusts to obtain legal review of every land and easement transaction, appropriate to its complexity, by an attorney experienced in real estate law.

- **Disclaimer Box.** Once a document based on the model has been prepared or reviewed on behalf of the Holder by an attorney licensed to practice law in the Commonwealth of Pennsylvania, the box following the signature area that begins “This document should not be construed or relied upon as legal advice...” may be deleted.
- **Other States.** Users outside of Pennsylvania need to take care to modify the model to account for differences in state laws.
- **Updates.** Check conserveland.org periodically for updates to the model.

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.

Header

- In the final version of a document prepared using the model 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.

Opening Recital

- **Purpose.** The purpose of the opening recital is to identify the parties to the Agreement 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 undersigned 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”.
- All owners as of the Agreement Date must join in the Agreement to be effective under applicable law.
- 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 entering into the Agreement, a phrase identifying the type of entity and state in which the entity 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 individuals or entity signing the 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 Person signed the document.

Holder

- The full legal name of the Holder (including Inc. or Incorporated if part of the legal name) should be inserted in the blank. If the Pennsylvania Fish and Boat Commission is the Holder, complete the blank with “the Commonwealth of Pennsylvania acting through the Fish and Boat Commission”.
- 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: Trout Unlimited, a non-profit corporation organized under the laws of the State of Michigan.

Article I. Background

- **Purpose.** The purposes of Article I 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 not 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 one or more parcels of land affected by this Agreement. The legal description attached as Exhibit “A” can be a photocopy of the legal description in the deed vesting title in the undersigned Owner or Owners.
- **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.
- **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.
- **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. *See* 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 Easement Objectives

- **Purpose.** This Section serves a number of important purposes. First and most obvious is that it explains why the Owners and Holder are entering into this Agreement. 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, it expressly provides the rationale underpinning particular covenants.
- The first objective of the Agreement is to expand fishing opportunities for anglers. If desired, the first bullet point can be expanded to add specific reference to the value of this particular Waterway to one or more programs of the Holder. Here is an example:

The Property is traversed for approximately ___ feet by the Waterway, which is classified by the Pennsylvania Department of Environmental Protection as a “high quality” stream. A high quality stream is recognized as having excellent water quality with a minimum of pollutants and contaminants and environmental features that require special water quality protection. Providing anglers access to the Waterway under this Agreement furthers the goals of the Lake Erie Access Improvement Program developed by the Pennsylvania Fish and Boat Commission.

- The first objective can be expanded to include other consistent recreational activity (e.g., “wildlife watching”).
 - The first objective can also be shortened. For example, if the stream can’t support boating, delete “and boating”.
 - The second objective of the Agreement is to improve the habitat for fish provided by the Waterway and its adjoining banks by preserving riparian buffer. If desired, the second bullet point can be expanded to explain the reasons why preservation of riparian buffer is important for the health of the Waterway. Here is an example:
- A continuous buffer of trees, shrubs and understory along the banks of the Waterway will minimize soil erosion into the Waterway and will provide shady overhang to moderate water temperature changes and provide hiding places for fish and other aquatic species.
- Where appropriate, the second bullet point could also be expanded to explain the conservation values of preserving appropriate habitat within the Riparian Corridor for particular amphibian or other animal species or to preserve bog, marsh or other water-dependent vegetation.
 - The third objective is to enable the Holder to use its resources to improve the health of the Waterway as well as conduct research and educational programs.

Optional Provision: Additional Recreational Uses Objective

- If the Agreement is intended to provide public access for additional recreational uses within the Riparian Corridor, a fourth bullet point can be added rather than expanding the objective of the first bullet point. Here is an example of text for a fourth bullet: “To provide public access to the Riparian Corridor for walking and wildlife watching.”
- If desired, add: “on a trail (the “Public Trail”) within the Riparian Corridor.”
- Other uses can be added such as hiking, bicycling and horseback riding on the Public Trail.

1.03 Easement Area; Easement Plan

- The purpose of this Section is to set the areas within the Property that are the subject of the Agreement. These are called, collectively, the “Easement Area”.
- (a) **Riparian Corridor**
- At a minimum, the Easement Area will consist of the Riparian Corridor described in subsection (a). If a Riparian Corridor of a set width is the only Easement Area, then there is no need to attach an Easement Plan and references to the Easement Plan can be deleted throughout the Agreement.

In the alternative (and to save editing of the document), a simple drawing showing the distance from the top of the bank of the Waterway can be attached as the “Easement Plan”.

- This description creates a Riparian Corridor that moves with the Waterway if the Waterway should meander. This supports a key purpose of the Agreement – to protect the aquatic habitat – wherever the Waterway may be at any particular time.
- A stream may meander off the Owners’ property. In that case, the Holder would not be able to require compliance with the Agreement as applied to areas outside the Property.
- The width of the Riparian Corridor should be as wide as is acceptable to the Owner who enters into the Agreement. A width of thirty-five (35) feet is furnished in the model but may be changed to reflect the width agreed upon by the Owners. 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 Corridor by means of a setback from a stream bank conforms to the requirements of §4(b) of the Pennsylvania Conservation and Preservation Easements Act, the act of June 22, 2001 (P. L. 390, No. 29) (32 P.S. §§5051-5059) set forth below. Otherwise, a metes and bounds description is required if the Riparian Corridor 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.

- If a question arises as to the precise location of the “top of the bank”, a 1932 Pennsylvania Superior Court case provides guidance (*Cole v. Pittsburgh & L.E.R. Co.*, 106 Pa. Super. 436, 162 A. 712 (1932)) as to the interpretation of that phrase under applicable law.
 - Locations where Holder intends to install Accessory Facilities within the Riparian Corridor may be shown but it is not necessary to do so. Section 2.01(c) permits Holder to install Accessory Facilities anywhere within the Riparian Corridor.
- (b) Outside Riparian Corridor**
- If Holder or public is permitted to access the Waterway via a pathway from a nearby public road, the location (perhaps with an indication of the width, if desired) should be identified on the Easement Plan. Locations for improvements outside the Riparian Corridor must be shown (see discussion of §2.01(c) below). If appropriate, the following can be substituted as the text under 1.03 (b): The undersigned Owner or Owners and Holder have not designated any areas outside the Riparian Corridor as “Easement Area”.

1.04 Consideration

- **Purpose.** The purpose of this Section is to set forth the amount of consideration (if any) being paid for the grant of easement to Holder. The model denotes nominal consideration by listing \$1.00 as the consideration. If the actual amount of consideration is more than \$1.00, change the amount accordingly. While not strictly necessary in Pennsylvania, nominal consideration is often inserted in legal documents to be sure an agreement to make a gift is legally binding.

Optional Provision: Items Needed for Federal Tax Benefits

- If the undersigned Owner or Owners intend to claim the donation of easement under the Agreement as a charitable donation of a partial interest in real estate (as defined under

§170(f)(3)(B)(iii) of the Internal Revenue Code) to a qualified organization (as defined in §1.170A-14(c)(1) of the regulations promulgated under the Internal Revenue Code), add to the Agreement a new §1.05 captioned “Federal Tax Items” containing subsections (a) through (i) set forth below.

- This commentary does not attempt to explain all of the requirements for qualification of the Agreement as a “qualified conservation contribution” under the provisions of §170(h) of the Internal Revenue Code. Owners should be advised to seek legal counsel and should be encouraged to review pertinent information provided by the Pennsylvania Land Trust Association on its website (conserveland.org) or the Land Trust Alliance on its website (www.lta.org).
- Commentary as to the content of this Section is provided in endnotes for clarity and should not be included in the text of the Agreement.

1.05 Federal Tax Items

(a) Qualified Conservation Contribution¹

The rights granted to Holder under this Agreement have been donated in whole or in part by the undersigned Owner or Owners. This Agreement is intended to qualify as a charitable donation of a partial interest in real estate (as defined in §170(f)(3)(B)(iii) of the Internal Revenue Code of 1986, as amended (the “Code”)) to a qualified organization (a “Qualified Organization”) as defined in §1.170A-14(c)(1) of the regulations promulgated under the Code (the “Regulations”).

(b) Public Benefit²

The undersigned Owner or Owners have entered into this Agreement to provide a significant public benefit (as defined in §1.170A-14(d)(2)(i) of the Regulations) by making the Riparian Corridor available to members of the general public to engage in the outdoor recreational activities of fishing and boating and by preserving scenic views of vegetated buffer along the Waterway for public users of the Waterway. Preservation of riparian buffer within the Riparian Corridor furthers numerous policies of the Commonwealth of Pennsylvania to improve water quality and preserve aquatic and riparian habitat established by the Pennsylvania Fish and Boat Commission, the Pennsylvania Department of Environmental Protection and the Pennsylvania Department of Conservation and Natural Resources.

(c) Mineral Interests³

No Person has retained a qualified mineral interest in the Easement Area of a nature that would disqualify the Agreement for purposes of §1.170A-14(g)(4) of the Regulations. From and after the Agreement Date, the grant of any such interest is prohibited and Holder has the right to prohibit the exercise of any such right or interest if granted in violation of this provision.

(d) Notice Required under Regulations⁴

To the extent required for compliance with §1.170A-13(g)(4)(ii) of the Regulations, Owners agree to notify Holder before exercising any reserved right that may have an adverse impact on the conservation interests or public recreational purposes associated with the Easement Area.

(e) Baseline Documentation⁵

The undersigned Owner or Owners and Holder have signed for identification purposes the report (the “Baseline Documentation”), to be kept on file at the principal office of Holder, that contains an original, full-size version of the Easement Plan together with other pertinent information regarding the conservation and public recreational interests served by the Agreement, including photographs depicting existing conditions of the Easement Area as of the Agreement Date. Whether or not attached to this Agreement, the Baseline Documentation is incorporated into this Agreement by this reference.

(f) Easement Area Right⁶

In accordance with §1.170A-14(g)(6) of the Regulations, the undersigned Owner or Owners agree that the easement granted under this Agreement gives rise to a property right, immediately vested in the Holder, that entitles the Holder to compensation upon extinguishment of the easement. The fair market value of the property right is to be determined in accordance with the Regulations; i.e., it is at least equal to the proportionate value that this easement as of the Agreement Date bears to the value of the Property as a whole as of the Agreement Date. Holder must use any funds received by application of this provision in a manner consistent with the recreational and conservation purposes of this Agreement.

(g) Qualified Organization⁷

Holder declares that it is a Qualified Organization and promises not to assign its interest under this Agreement to any Person other than a Qualified Organization.

(h) Perpetuity⁸

Holder has the right and duty to enforce the terms of this Agreement in perpetuity. If Holder fails to enforce this Agreement, a court of competent jurisdiction is authorized to appoint another Qualified Organization to enforce this Agreement in perpetuity.

(i) Acknowledgment of Donation⁹

Except for such monetary consideration as is set forth in Article I, the undersigned Owner or Owners have received no money, goods or services in consideration of the grant of this easement. The value of the donation is to be established by appraisal performed by an appraiser engaged by the undersigned Owner or Owners.

Optional provision: No Charitable Deduction:

- If the undersigned Owner or Owners are certain that they will not be pursuing federal tax benefits, an alternative Section 1.05 (“No Charitable Deduction”) could be added to confirm the understanding of the parties. The following text could be used:

The undersigned Owner or Owners and Holder confirm that the grant to the Holder of the easement under this Agreement is not intended to be a qualified conservation contribution under the Internal Revenue Code of 1986, as amended through the applicable date of reference.

Article II. Grant of Easement

- **Purpose.** The purpose of this Article is to set forth the nature and extent of the rights granted to Holder within the Easement Area and the nature and extent of the rights retained by Owners to continue using the Easement Area without interfering with the fishing and boating recreational access intended to be provided for the benefit of the public.

2.01 Rights of Holder

- **Purpose.** This Section operates to grant to Holder the perpetual right to enforce up to four easement rights in the Easement Area no matter who owns the Property. These easement rights must be exercised only in furtherance of the Easement Objectives identified in Article I.
- **Unconditional.** The grant to the Holder is 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. If the Owners intend to qualify for a charitable contribution under §170(h) of the Code, the term must be perpetual.

- **Recording.** Recording in the public land records of the county in which the Property is located is necessary to make the covenants binding upon future owners who do not otherwise know about the terms of the 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.
- (a) Public Access**
- The easement granted in subsection (a) is the only right that flows directly to the benefit of the public. The right of entry by the public is limited by Access Restrictions and that term has been defined expansively to include any rules, regulations or limitations established by Holder on public access. These rules may, but need not necessarily, include all of the rules and regulations promulgated by the Commission with respect to fishing activities.
 - If desired, the public access rights granted may be expanded to include other activities such as walking and bird watching. See the commentary to the Easement Objectives at §1.02.
 - If required by Owners as a condition of the grant, particular limitations on time, place or manner of public access may be incorporated into the Agreement in either of two ways. If Owners and Holder intend that Holder is to enforce the limitations as part of its regulatory program, then the limitations should be incorporated into the definition of “Access Restrictions” in §2.01(a). For example, a sentence could be added to existing §2.01(a) as follows: “Included in the Access Restrictions is a limitation on public entry to the hours between dawn and dusk. Holder agrees to include that limitation on signage posted within the Easement Area.” If there are a number of additional Access Restrictions, an alternative might be: “The phrase “Access Restrictions” also includes the limitations set forth in Exhibit “__” attached to this Agreement.”
 - If Holder does not have a problem with one or more limitations desired by Owners so long as Owners have the right (and Holder has no obligation) to enforce them, those limitations should not be listed as Access Restrictions but, instead, should be incorporated into the Agreement under §2.02(c) entitled “Owners’ Enforcement Rights”.
- (b) Management Activities**
- The easement granted in subsection (b) (as well as those set forth in (c) and (d)) run to the benefit of the Holder but may also be exercised by any Beneficiary in furtherance of its scientific, educational and resource management programs.
- (c) Accessory Facilities**
- The easement granted in subsection (c) permits Holder to install temporary or permanent improvements within the Easement Area. Note that locations outside the Riparian Corridor are limited to those (if any) shown on the Easement Plan.
 - The phrase “Accessory Facilities” is defined broadly. If required by the Owners as a condition of entering into the Agreement, a limitation such as the following can be added at the end of existing subsection (c) rather than modifying the definition of “Accessory Facilities”: “Notwithstanding the breadth of the grant of easement set forth in this §2.01(c), unless Owners, without any obligation to do so, agree otherwise, Accessory Facilities to be installed by Holder under this Agreement are limited to the following: _____.”
 - If an Owner is concerned about potential liabilities involved in construction of Accessory Facilities, the following may be added to subsection (c): “Holder must give Owners at least 10 days notice before commencing construction or installation of Accessory Facilities, must furnish

to Owners certificates of insurance from Persons (other than government employees) engaged in construction or installation of Accessory Facilities, and must complete and pay in full for any Accessory Facility commenced by Holder within a reasonable period of time.”

(d) Access

- This grants a right-of-way over the Property from the public right-of-way to accommodate the exercise of the rights granted in the previous subsections. For example, if Holder has a right to stock fish within the Riparian Corridor, the Holder has a right to cross the Property to do so using a vehicle, if reasonably necessary. The public’s right to access, however, is more limited. Unless specifically identified as a public access corridor connecting the public right-of-way to the Riparian Corridor, anglers are limited to entering the Riparian Corridor via the Waterway itself.
- If required by Owners as a condition of entering into the Agreement, a limitation can be added to the end of existing subsection (d) defining a particular route for Holder’s vehicular access or providing for the Owner’s right to relocate public access points to accommodate changes in Owners’ agricultural or other uses of the Property.

2.02 Rights of Owners

- **Purpose.** The purpose of this section is to balance the interests of Owners in continuing their beneficial ownership and use of the Easement Area with the rights granted to Holder in §2.01.

(a) Consistent with Easement Objectives

- The general rule set forth in subsection (a) is that Owners can continue to use their entire Property including the Easement Area so long as the use is consistent with the Easement Objectives and does not interfere with the rights granted to Holder in Article II. The schedule of “Permitted Uses” can be used for two purposes (i) to assure Owners that they can continue to engage in particular activities and uses that are important to them; and (ii) to allow for exceptions to the activities listed in subsection (b) that are generally considered not consistent with Easement Objectives.

(b) Not Consistent with Easement Objectives

- The list of limitations should be reviewed carefully with Owners to see if any exceptions need to be made by listing the exceptions as “Permitted Uses”. The limitations list is intended to keep the Riparian Corridor as undeveloped and undisturbed as possible; however, exceptions can be made where appropriate.
- The following are some examples of activities that a Holder might be willing to list as “Permitted Uses” in appropriate circumstances:
 - (i) Mowing grassy areas that have been maintained as lawn or turf as of the Agreement Date.
 - (ii) Watering of livestock within a stream access structure (including installation of such structure if not existing as of the Agreement Date) in the location identified on the Easement Plan or, if no location is identified, then in a location approved by Holder.
 - (iii) Removal of Invasive Species. The term “Invasive Species” means a plant species that is (a) non-native (or alien) to the ecosystem under consideration; and (b) whose introduction causes or is likely to cause economic or environmental harm or harm to human health. In cases of uncertainty, publications such as “Plant Invaders of the Mid-Atlantic Natural Areas”, by the National Park Service National Capital Region, Center for Urban Ecology and the U.S. Fish and Wildlife Service, Chesapeake Bay Field Office are to be used to identify Invasive Species.
 - (iv) Sustainable forestry subject to Holder’s review and approval of a forest management plan and utilizing best management practices.
- Owners should be aware that compliance with the limitations set forth in subparagraph (b) may require fencing off the Riparian Corridor from pasture areas where livestock graze.

(c) Owners' Enforcement Rights

- The purpose of this provision is to give Owners comfort that they are not totally dependent upon the Holder to enforce Access Restrictions and that they can treat as trespassers any persons entering the Property for purposes other than fishing, boating and other permitted uses.
- If required by the Owners as a condition of entering into the Agreement, specific limitations that Owners may enforce at Owners' discretion can be added to the existing provision. The following is an example of objectionable uses that Owners may want to handle with the assistance of local police rather than calling on the Holder to regulate as an Access Restriction.

Without limiting the generality of the preceding sentence, Holder agrees that Owner has the right to enforce the following limitations upon public access:

- (i) No swimming, picnicking, barbecuing or lighting of fires.
- (ii) No loitering, littering or consumption of alcoholic beverages.

2.03 Rights of Beneficiaries

- The model Agreement is written as if no Beneficiary has been named at the time of execution. If a nonprofit or governmental entity is intended to be a Beneficiary, the statement in the model is to be deleted and each Beneficiary should be listed.
- Any non-profit or governmental entity can be named as a "Beneficiary" of this Agreement (e.g., the Commonwealth of Pennsylvania acting through the Pennsylvania Fish and Boat Commission). The Beneficiary has all of the rights (but none of the responsibilities) of a Holder. See also §4.04(a), Each Beneficiary is vested with the "rights of third party enforcement" under the Conservation and Preservation Easement Act.
- If a county, township or other political subdivision of the Commonwealth is participating in the Easement acquisition transaction, land trusts may want to consider naming the county or township as the Holder rather than as Beneficiary or, if the land trust is initially named as Holder, its rights and responsibilities of Holder with respect to the Easement could be transferred to the governmental entity by inserting an assignment and assumption clause as set forth below. Land trusts and governmental entities can both assert immunity under the Recreational Use Act referred to in Article III but governmental entities can also assert immunity under the Sovereign Immunity Act and the Political Subdivision Tort Claims Act. In addition, should public access result in a claim that is for some reason not barred by immunity, the cost of defending and settling or paying the claim would be borne by the public rather than the assets of the land trust.

Optional Sections: Adding Beneficiaries with Fewer Rights than the Holder:

- As shown in the examples below, the rights given to a Beneficiary can be customized to the circumstance. Sometimes it will be desirable to give the Beneficiary many rights, sometimes one or two rights will be more appropriate. To follow this option, delete the standard language of this Section and replace it with one or more of the alternatives presented below.
- Here is a generic Beneficiary provision that can be customized for many different situations:

(a) _____ Beneficiary

_____, (the "Land Trust/State/County/Township Beneficiary") is a Beneficiary of this Agreement. Owners and Holder grant and convey to the "Land Trust/State/County/Township Beneficiary" the following rights with respect to this Agreement: *[select all that apply]*

- (i) The right to compel transfer of Holder's rights and duties under this Agreement to another Qualified Organization should Holder fail to make the Trail available for public recreation.
- (ii) The right to exercise Holder's rights and duties under this Agreement should Holder fail to make the Trail available for public recreation.

- (iii) The right of prior approval of any amendment of this Agreement.
 - (iv) The right of prior approval of any transfer of Holder's rights under this Agreement.
- If there is only one Beneficiary, the words "Land Trust, State, County, or Township" can be dropped and the entity can simply be called the "Beneficiary."
 - The specific rights set forth in the Agreement supplement rather than replace the rights and remedies of state or local agencies under applicable programs and grant contracts. For example, if a grant contract requires prior approval by county of any amendment to the Agreement, then the Holder is contractually bound to seek county approval whether or not county has recorded an acceptance.
 - If DCNR has provided funding to acquire the easement in whole or in part, insert the following provision:

(b) Pennsylvania Department of Conservation and Natural Resources

This easement was either acquired with, or donated as a match for, funds provided by the Pennsylvania Department of Conservation and Natural Resources under the [Environmental Stewardship and Watershed Protection Act, the act of December 15, 1999, P.L. 949, No. 68, as amended (27 Pa.C.S.A. §§ 6101 et seq.) OR Keystone Recreation, Park and Conservation Fund Act, the act of July 2, 1993, P.L. 359, No. 50 (32 P.S. §§ 2011 et seq.) OR other grant legislation]. This easement is a conservation servitude over the property in perpetuity and as such is binding on all current and subsequent easement holders and their personal representatives, successors and assigns. The Department and its successors have the following rights with respect to this easement: a) the right to compel transfer of the easement holder's rights and duties to another entity, including a municipality, if the easement holder fails to uphold and enforce the provisions of the easement, b) the right of prior approval of any amendment of this easement, c) the right of prior approval of any transfer of the easement holder's rights or interests under this easement, and d) the right to exercise the easement holder's rights and duties under this easement if the easement holder fails to uphold and enforce the provisions of the easement.

Optional Provision: Assigning Easement to Government

- If a nonprofit is initially identified as the intended Holder when seeking a Department of Conservation and Natural Resources (DCNR) grant, and it subsequently becomes preferable to have a governmental entity take a lead role, an assignment provision such as the one below might be appropriate. If an assignment clause is used, the assignee must sign the Agreement in order to assume responsibility. The Department of Conservation and Natural Resources requires that the assignee sign the document and that the Holder remain responsible for enforcement should the Beneficiary fail to do so.

By signing this Agreement, Holder assigns to Township, and Township assumes, all of Holder's rights, powers and responsibilities with respect to the public access granted under this Easement. Holder reserves the right, power and responsibility to enforce the grant of public access under this Agreement should Township fail to do so.

Optional Provision: Naming an Administrative Agent

- **One Decision-Maker.** The approach taken by the model is that only one Person should be identified as Holder. Any number of governmental and non-governmental organizations can be named as Beneficiaries but, ultimately, when a decision has to be made, the Holder must make the decision and take responsibility for the reasonableness of its decision. If a Person (such as a County or Township) is not satisfied with a right of prior consultation and instead requires a veto power on review, then that Person (rather than the other) should be named as the Holder and, in that case, the other might be named as an Administrative Agent under the following provision which would be added as an additional Section.

2.04 Administrative Agent

The Holder has appointed _____, (the “Administrative Agent”) as the agent of Holder for purposes of administering this Agreement. Owners and Holder acknowledge that the duty of Administrative Agent is to provide inspection and review services in the ordinary course; to communicate decisions of Holder with respect to items needing interpretation; and to perform such other Agreement-related construction and maintenance services as are requested by Holder under the terms of a separate agreement between Holder and Administrative Agent.

Article III. Other Legal Matters

- This Article is intended to address other issues that need to be addressed to give Owners or Holder, as the case may be, assurance as to their legal rights, powers and responsibilities.

3.01 Enforcement

- **Purpose.** The purpose of this Section is to give the Holder assurance that, besides its right to commence a civil action in a court of competent jurisdiction for damages, the Holder has the right to obtain relief in the nature of a court order forcing the Owners to do or refrain from doing certain activity. For example, if an Owner refused to remove a barrier to access, the Holder may need to obtain a court order requiring him to do so. Sometimes the Holder may want the power to enter the Property so as to stop a violation while a court order is being sought to restrain further activity. In that case, the Holder (if not otherwise vested with police power) is urged to consult with counsel and, if circumstances suggest that entry is unwelcome, to consider requesting police escort. The power of self-help (for Holders not vested with police power) should be used only if the entry can be made without violence and without harm to persons or property.

3.02 Warranty

- **Purpose.** The purpose of this Section is to evidence the assumptions under which Holder is willing to enter into this Agreement with the undersigned Owner or Owners.

(a) Subordination of Liens

- Subordination of any mortgage or other lien affecting the Property as of the Agreement Date is important because Holder needs assurance that the Agreement could not be extinguished by foreclosure of a mortgage or other lien prior in right to the Agreement.

(b) Existing Agreements

- The Holder wants assurance that, for example, the Owners haven’t given a tenant farmer a lease that would prevent Holder from crossing the Property to access the Riparian Corridor or that someone else has been granted the right to divert water away from the Waterway.
- If there are existing agreements affecting the Easement Area, they can be incorporated by reference in this subsection and further described in an attached exhibit. Existing agreements are entitled to priority over the easement to be executed under applicable law.

(c) Hazardous Materials

- Before taking an interest in land, it is prudent to request confirmation that the Owners do not know of any environmental problems associated with the Easement Area.

3.03 Repair of Accessory Facilities; No Duty to Inspect

- The purpose of this Section is to give Owners comfort that any Accessory Facilities installed by Holder will not become the problem of Owners to maintain and repair. While not requiring Owners to inspect regularly, the provision encourages Owners or members of the public utilizing Accessory Facilities to notify the Holder if they observe a dangerous or unsafe condition.

3.04 No Charge for Access

- If anybody—Owners, Owners, Holder, Beneficiary or a person licensed by any of them—charges a fee for any recreational use then the claim to statutory immunity under the Recreational Use of Land and Water Act is lost in the event of a claim of injury in the Easement Area.

3.05 Immunity under Applicable Law

- The purpose of this Section is to give Owners comfort that, should a claim be asserted by someone injured within the Easement Area, they can, to the extent available, assert the defense of statutory immunity under the Recreational Use of Land and Water Act.
- The Recreation Use of Land and Water Act states that: "an owner of land who ... invites or permits without charge any person to use such property for recreational purposes does not thereby ... [a]ssume responsibility for or incur liability for any injury to persons or property caused by an act of omission of such persons." However, an owner may be open to liability "[f]or wilful or malicious failure to guard or warn against a dangerous condition, use, structure, or activity" or "in any case where the owner of land charges [an admission price or fee to] the person or persons who enter or go on the land for the recreational use thereof". Pennsylvania Recreation Use of Land and Water Act, 68 P.S. §§ 477-4 and 477-6.
- Nonprofits and governmental entities can both assert immunity under the Recreational Use of Land and Water Act, but governmental entities can also assert immunity under the Sovereign Immunity Act and the Political Subdivision Tort Claims Act.

Optional Provision: Claims and Indemnification

- Owners may want to be indemnified from claims for personal injury or property damage arising from the access to the Easement Area granted to the public under the Agreement. If a Holder is willing to indemnify Owners from liability resulting from Public Access Claims, the provision below can be inserted as an additional section under Article III.
- The Commonwealth of Pennsylvania and its Departments and instrumentalities (including the Fish and Boat Commission) do not offer any indemnity to others for claims as to which it is immune from liability under the doctrine of sovereign immunity. Counties, local governments and private organizations acting as Holder may or may not be willing to indemnify Owners from such claims. Optional Provision: Responsibility for Losses and Litigation Expenses

3.06 Responsibility for Losses and Litigation Expenses**(a) Public Access Claims; Owner Responsibility Claims**

If a claim for any Loss for personal injury or property damage occurring within the Easement Area after the Agreement Date (a "Public Access Claim") is asserted against either Owners or Holder, or both, it is anticipated that they will assert such defenses (including immunity under the Recreational Use of Land and Water Act) as are available to them under applicable law. The phrase "Public Access Claim" excludes all claims (collectively, "Owner Responsibility Claims") for Losses and Litigation Expenses arising from, relating to or associated with (i) personal injury or property damage occurring prior to the Agreement Date; (ii) activities or uses engaged in by Owners, their family members, contractors, agents, employees, tenants and invitees or anyone else entering the Property by, through or under the express or implied invitation of any of the foregoing; or (iii) structures, facilities and improvements within the Easement Area (other than Accessory Facilities installed by Holder).

(b) Indemnity

If immunity from any Public Access Claim is for any reason unavailable to Owners, Holder agrees to indemnify, defend and hold Owners harmless from any Loss or Litigation Expense if and to the extent arising from a Public Access Claim. Owner agrees to indemnify, defend and hold the Holder harmless from any Loss or Litigation Expense if and to the extent arising from an Owner Responsibility Claim.

(c) Loss; Litigation Expense

As used in this Agreement:

- (i) The term “Loss” means any liability, loss, claim, settlement payment, cost and expense, interest, award, judgment, damages (including punitive damages), diminution in value, fines, fees and penalties or other charge other than a Litigation Expense.
- (ii) The term “Litigation Expense” means any court filing fee, court cost, arbitration fee or cost, witness fee and each other fee and cost of investigating and defending or asserting any claim of violation or for indemnification under this Agreement including in each case, attorneys’ fees, other professionals’ fees and disbursements.

Optional Provision: Insurance

- The following provision can be inserted under this section to require policies of public liability insurance to be maintained as a source of funding the respective indemnity obligations of Owners and Holder described in §3.05(b). For the Holder, this coverage would be provided under its policy of commercial general liability insurance. For the Owner, this coverage would be provided under its policy of homeowner’s insurance.

(d) Insurance

Owners and Holder must maintain commercially reasonable policies of public liability insurance with contractual liability endorsement to provide insurance coverage for that Person’s indemnity under this Section.

Article IV. Miscellaneous

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

4.01 Notices

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

(b) Address for Notices

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

4.02 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.

4.03 Binding Agreement

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

4.04 Guides to Interpretation

- The provisions of this section are intended to assist future readers of the document to interpret it correctly.
- (a) **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.
 - The Conservation Easements Act defines a “third party right of enforcement” as “[a] right provided in a conservation easement to enforce any of its terms, granted to a governmental body, charitable corporation, charitable association or charitable trust, which, although eligible to be a holder, is not a holder.”
 - The Coal Rights Notice 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.
- (b) **Restatement of Servitudes**
 - The purpose of this paragraph is to increase the likelihood that a court interpreting this 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 easements. *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.*
- (c) **Terms**
 - The purpose is to avoid needless repetition of phrases and define all capitalized terms used but not defined elsewhere in the Agreement.
- (d) **Incorporation by Reference**
 - The purpose is to avoid needless repetition of phrases.

4.05 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 Agreement. Second, it puts the Holder on notice of their need to inform staff or other persons performing monitoring or administrative duties of the limits of their authority.
- **Authorization.** Holder must establish what authorization is needed for amendments, waivers or consents.
- **Amendment.** Ordinarily, an amendment needs to be approved by the same official or governing body that approves acceptance of the Agreement. An amendment is signed with all of the formalities required of the original Agreement and is intended to be recorded in the public records just as the original Agreement. An amendment permanently changes the terms of the 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 Agreement. For example, a fire or extended drought may necessitate Owners taking extraordinary measures not specifically permitted under the terms of the Agreement. The terms of the Agreement remain unchanged but the Holder waives its right to invoke its remedies. 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.

4.06 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.

4.07 Counterparts

- **Purpose.** There are several purposes for this provision. First, it makes clear that more than one counterpart of the 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.

4.08 Entire Agreement

- The written text of the 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.

Closing Matters

- **Closing:** The phrase “INTENDING TO BE LEGALLY BOUND” is especially important in 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 Agreement. It is good practice to sign in black ink rather than blue ink so that signatures are legible on microfilm or microfiche.
- **Acceptance by Beneficiary.** The Conservation and Preservation Easements Act requires beneficiaries to sign the Agreement (or record a separate document of acceptance) to evidence their acceptance of the rights and duties. The acceptance does not have to be made a part of the initial Agreement but can be recorded later if and when the need arises for beneficiary to enforce its rights under the Agreement independent of the Holder. Delete or add Beneficiary signature lines as necessary.
- **Acknowledgment.** The date of the acknowledgment should not be earlier than the Agreement Date. *See* commentary to opening recitals of Agreement.
- **Exhibits.** Check that all exhibits referenced in the Agreement are attached to the Agreement before it is signed and recorded in the public records!

¹ The purpose of this subsection is to set forth the intention of the parties that the Agreement is intended to qualify for tax deductibility as a charitable donation under §170 of the Internal Revenue Code. In the case of a bargain-sale of an Agreement, the donation is being made “in part”. The amount of the donation is the diminution in value (if any) of the Property resulting from the Agreement as determined by an independent appraiser in accordance with applicable Regulations. In the case of a bargain-sale, the purchase price received by the Owners reduces dollar for dollar the amount of the donation.

² The terms of the Agreement must further a significant public benefit of a kind recognized in the Regulations to qualify for tax deductibility. One type of public benefit is making land available for public outdoor recreation and education for the substantial and regular use of the general public or the community. Another public benefit is preservation of open space to preserve scenic views or further public policies.

Reference to county or municipal policies furthered by the protections afforded in the Agreement can be added to subsection (b).

³ If someone other than Owner has the right to extract or remove minerals by surface mining, the Agreement will be disqualified for charitable contribution purposes unless the probability of extraction or removal is so remote as to be negligible.

⁴ The Regulations specifically mention the right to extract certain minerals as an example of a reserved right for which notice under the Regulations is required.

⁵ The Baseline Documentation is intended to serve as an objective information baseline for monitoring compliance with the terms of the Agreement. Among other information describing and depicting the Waterway and the vegetative and other resources to be found within the Riparian Corridor, the Baseline Documentation should include photographs identifying the location of the Waterway as of the Agreement Date. The Baseline Documentation is incorporated into the text of the Agreement under this subsection 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 Agreement between Owners and the Holder dated _____. Whether or not tax deductibility is an issue, it is good practice for the Holder to keep on file a record of the aquatic and riparian habitat values within the Riparian Corridor and existing improvements on or about the Easement Area as of the Agreement Date. This information will assist the Holder in enforcing the terms of the Agreement should enforcement become necessary.

⁶ If the original Owners entering into the Agreement claim on their federal income tax return that the value of the Property was diminished by 20% due to the Agreement, the Owners as of the date of condemnation must turn over 20% of the proceeds of any condemnation affecting the Easement Area to the Holder.

⁷ A “Qualified Organization” is either a governmental entity or a non-profit entity that (a) has a perpetual existence; (b) is established as a public charity for the purpose of preserving and conserving natural resources, natural habitats, environmentally sensitive areas and other charitable, scientific and educational purposes; (c) has the funds and commitment to enforce this conservation easement in perpetuity; and (d) is duly authorized to acquire and hold conservation easements under applicable law.

⁸ Note that enforcement is not optional with the Holder – it must be a duty in order for the Agreement to qualify for tax deductibility as a charitable donation. The Holder must have the right to enforce the conservation restrictions by appropriate legal proceedings including, but not limited, to the right to require restoration of the Easement Area to its condition as of the Agreement Date.

⁹ All donations (whether cash or non-cash) of \$250 or more must be acknowledged contemporaneously in accordance with the requirements of §170(f)(8) of the Internal Revenue Code. This includes donations of real property interests (whether ownership interests or conservation easements) and cash donations received in connection with acceptance of real property interests. The amount of cash received must be specified; however, as to non-cash property (for example, an easement) a description (but not value) of the donation will suffice. The acknowledgment will be considered to be contemporaneous if received on or before the date the taxpayer files a return for the taxable year in which the contribution was made. PALTA recommends that Holders acknowledge the donation by separate letter; acknowledgment within the Agreement guards against inadvertent failure to provide acknowledgment by separate letter.