

# Riparian Buffer Protection Agreement

*A riparian buffer protection agreement limits activities on all or a portion of a property to advance conservation purposes while keeping the property in the control of the landowner.*

Last updated: June 30, 2011

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## **Prefatory Sections**

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### **Summary**

A riparian buffer protection agreement limits construction on and uses of land bordering a waterway to protect that resource and advance other conservation purposes agreed to by the landowner and a private charitable conservation organization or government (the “holder”). While the property remains in the landowners’ control, the landowner grants to the holder the power to constrain actions impacting the land to ensure that the agreed to conservation purposes are respected. This power is often called a “conservation easement” or “conservation servitude” because it is an interest, albeit narrow, in real property. The riparian buffer protection agreement is recorded at the county recorder of deeds office and “runs with the land”, binding both present and future owners to its terms.

The agreement is tailored to the particular property and to the goals of the landowner and conservation organization or government. For example, within the first 50 feet of a stream, activities inconsistent with water and habitat protection may be ruled out but, extending further outward, a variety of sustainable uses may be allowed depending upon their potential to erode soil or otherwise degrade water resources.

The Pennsylvania Land Trust Association publishes and maintains the [Model Riparian Buffer Protection Agreement and Commentary](#) for the benefit of private and public holders, landowners and their respective legal counsel.

### **Typical End Users**

- Individual or business

- Local government
- Nonprofit organization
- State or federal agency

A riparian buffer protection buffer agreement requires the agreement of all the owners of a particular property and a “holder”, which may be a unit of government or a nonprofit organization that has conservation as part of its purpose.

## Conservation Impact

- Riparian buffer protection agreements can be customized to address a landowner’s particular needs to the extent that those needs are consistent with the goals of conserving the riparian buffer and protecting the water quality of the adjoining waterway.
- Riparian buffer protection agreements achieve conservation purposes *while keeping lands in the control of landowners*.

## What You’ll Need

- A willing landowner and a willing holder (a charitable conservation organization or a unit of government).
- A legal document that sets out the agreement, which is recorded in the public records. The latest edition of the Model Riparian Buffer Protection Agreement and Commentary is available to landowners and holders as well as their legal counsel at [ConserveLand.org](http://ConserveLand.org) and [ConservationTools.org](http://ConservationTools.org).
- Landowner and holder should both have legal counsel.

## Obstacles and Challenges

- To assure that the goals of the riparian buffer protection agreement are being met, the holder will want to periodically inspect the buffer area for compliance with the agreement. The holder also may need to take action if the conservation objectives of the agreement are not being respected. Responsible conservation organizations set aside a stewardship fund to ensure that conservation goals will be met in perpetuity. Obtaining adequate funding for long-term stewardship can be a challenge.
- Landowners need to think through, with the help of counsel, foreseeable land use needs in the future and the effect the conservation easement will have, if any, on their financial position.
- Any legal document that sets the framework for a long-term, land-based, working relationship will probably be fairly lengthy. Shorter documents tend to leave unaddressed and unresolved questions that may arise in the future. The advantage of resolving problems before they arise is that cooler heads can usually find an acceptable middle ground. The disadvantage, of course, is that the process of negotiation and documentation takes time and effort. By addressing issues with a view to accommodating concerns of both landowners and holders, users of the [Model Riparian Buffer Protection Agreement](#) may find that their concerns have, for the most part, been addressed.

## **Introduction**

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### **Purpose**

The riparian buffer protection agreement is a tool to help private landowners and conservation organizations or governments work in partnership to establish permanent riparian buffers along waterways. The purpose of establishing these buffers might include:

- Maintaining and improving the quality of water resources associated with the waterway;
- Perpetuating and fostering the growth of healthy woodland (or if natural conditions are not conducive to forest growth, then healthy marsh, shrub land, etc.);
- Preserving habitat and migration corridors for native species;
- Preventing or mitigating soil erosion into the waterway; and
- Ensuring 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.

### **Appropriate Tool for Appropriate Situation**

The most distinguishing feature of the riparian buffer protection agreement as a conservation tool is that it enables users to achieve specific conservation objectives on the land while keeping the land in the ownership and control of landowners for uses consistent with the conservation objectives. For example: If a community seeks to ensure that no development will occur near a high quality stream known for its recreational and wildlife values and seeks to ensure that forestry is conducted sustainably and without damaging water supplies, riparian buffer protection agreements may achieve these goals with the landowners still able to generate timber and other revenue from the property.

A riparian buffer protection agreement on the land can complement private economic activities rather than preclude or severely hamper them. However, the agreements have their limits. For example, if the organization or government wants the ongoing ability to dictate to landowners how to manage their land beyond the restrictions typically set forth in a protection agreement, then the protection agreement may not be the best choice of tools.

### **An Interest in Real Property**

#### **Runs with the Land**

To protect a riparian buffer, the owners and the “holder” (a nonprofit conservation organization or government) sign and record at the county recorder of deeds office a document that vests in the holder a real property interest in the area identified for

protection. This property interest is quite narrow. The owners retain their rights to possess, control and responsibly manage the land and to exclude trespassers. holder is granted only the right to constrain the use of the land to the extent necessary to achieve the conservation purposes specifically agreed to by the owners. These purposes, also referred to as goals or objectives, are set forth in the document; so too are a set of restrictions and limitations identified by the owners and holder as being the agreed upon means to achieve the identified objectives.

The conservation objectives and restrictions established by the owners, as well as the rights that the owners grant to the holder to advance the objectives and enforce the restrictions, run with the land, binding all future owners of the land.

### **Nomenclature**

The real property interest granted to holder in a riparian buffer protection agreement often is called a *conservation easement* in Pennsylvania. (The Pennsylvania law providing statutory authority for the creation and handling of these interests is named the “Conservation and Preservation Easements Act”.) A national panel of respected legal scholars and practitioners has convincingly advanced the label “conservation servitude”. (See the Restatement of the Law (3d) of Property—Servitudes.) From here forward, this guide generally will use the term “conservation easement” or “easement” to identify this real property interest.

### **Other Rights May Be Granted**

In some cases, owners may choose to grant the holder the right to remove invasive non-native plant species, plant native species or even to establish a public trail or public access to the waterway. However, owners are not obligated to do so, and holders often are not interested in seeking these additional rights.

## **What is a Riparian Buffer Protection Agreement?**

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### **A Servitude**

#### **Long-term Arrangement for Land Use**

In legal terms, a riparian buffer protection agreement is a type of servitude. Servitudes allow people to create stable long-term arrangements involving land uses for a variety of purposes. The wider class of servitudes includes everything from a shared driveway arrangement between two neighbors to the complex structure of easements, restrictive covenants and affirmative covenants that will govern an entire planned community. A conservation servitude (also known as a conservation easement) is simply a long-term arrangement to regulate land use for conservation purposes. It operates by vesting a power in a holder to constrain activities on the land in order to achieve conservation purposes.

### **Holders' Rights Limited to Particular Purpose**

There are two important differences between servitudes and other types of real estate interests. The first is that, as the name suggests, *servitudes serve a purpose*. The purpose is not only the reason for the arrangement, it sets the limits of the rights or powers vested in the holder of the servitude. In the case of a servitude granted to conserve land important to a waterway, the rights and powers vested in holder are not unlimited -- they must be reasonably related to achieving that purpose. Both landowners and holder should strive not only to make the purposes of the riparian buffer protection agreement clear but also to create a set of restrictions that is demonstrably related to achieving that purpose.

### **Possession and Ownership Remain with Landowners**

The second difference between servitudes and other types of real estate arrangements is that servitudes are "non-possessory", which means that (unlike leases and other estates in land) all rights of ownership and possession remain with the landowners. Neither the holder nor anyone else has the right to exclude the landowners from using their entire property including the riparian buffer area. Their use must be consistent with the conservation objectives of the riparian buffer protection agreement but they always remain in sole and absolute possession of their land.

Landowners continue to have absolute control over who may enter the property and for what purpose. The riparian buffer protection agreement will ordinarily grant holder the right to enter for purposes of monitoring compliance with, or remedying violations of, the conservation easement and no other purpose. Some landowners may be willing to grant holder a right of entry to study aquatic species or to stabilize banks of the waterway. Others may be willing to grant rights of public access for fishing, boating and other recreational uses. These are affirmative access easements (rights of entry for particular purpose) rather than conservation easements, and are usually granted by a separate document.

### **Vested Right in Holder**

A servitude is not an agreement in the nature of a contract. The title of the document may use the word "agreement" (as in, for example, Riparian Buffer Protection Agreement) but, in order to achieve its objective of permanent protection, the content must create a servitude for conservation purposes on the land. The grant of a servitude permanently and unconditionally vests in the holder a right or power to use, or constrain the use of, land for a particular purpose. The process starts with a meeting of the minds between the granting landowners and the holder but, once the granting document is recorded, the conservation easement binds the land whether future owners agree with it or not. That does not mean that anything written in a recorded document is enforceable against future owners. A conservation easement, like other servitudes, is an extraordinary arrangement forever binding on people who never agreed to it. Care must be taken to keep the arrangement both reasonable and purpose-driven if it is to be enforced against future owners.

## Other (Sometimes Problematic) Descriptions of Conservation Easements

### Agreement

Land trusts in their marketing materials sometimes take the approach of emphasizing the cooperative aspect of their easement work and referring to the documents used to vest conservation easements as agreements, for example, a “Riparian Buffer Protection Agreement”. *In Their Own Words: Fifteen Stories of Conservation and Inspiration* (2007), introduces the conservation easement as:

[a]n agreement between a landowner and a private land trust or government. The agreement limits certain uses on all or a portion of a property for conservation purposes while keeping the property in the landowner’s ownership and control. The agreement is tailored to the particular property and to the goals of the owner and conservation organization. It applies to present and future owners of the land.

Such descriptions abound in land trust marketing materials. Although use of the term “conservation *easement*” and references to it binding future owners indicates that this creature is more than a simple contract between two parties, a focus on the agreement aspect of the conservation easement can cause confusion.

The following agreement-centric description explains the nature of the conservation easement with less elegance than above but with an appropriate added emphasis on the conservation easement’s grounding in property law:

A landowner and a land trust or government may agree on conservation objectives for the landowner’s property and associated restrictions on the use of the property to advance those objectives. They may then make their agreement operational by signing and recording a legal document in which (1) the landowner imposes conservation objectives for and restrictions on the land; (2) the landowner vests in the land trust or government the right to uphold these objectives and enforce the restrictions; and (3) the holder commits to uphold and enforce the objectives and restrictions.

### Development Rights

Government (and a few private) programs, particularly those engaged in farmland preservation, sometimes label themselves as purchase of development rights or PDR programs and explain their business as being the purchase of development rights. This label is misleading. In fact, these programs are not purchasing development rights, but rather, are incentivizing the owners to place development restrictions on their land for conservation purposes and purchasing the right to enforce these owner-imposed restrictions. It is not as though these programs are acquiring development rights on property that the programs could later sell to a developer or exercise itself.

### **Bundle of Sticks or Rights**

In conservation publications, property ownership is sometimes characterized as an owner possessing a bundle of sticks or rights. An owner has the right to use their land in a large variety of ways, subject to local zoning and other laws. An owner has the right to plant trees or cut them down, the right to construct buildings or demolish them, the right to grow crops or pile rocks, and so on. These rights can be thought of as a bundle of sticks. The owner may give away, sell, lease and otherwise transfer these various sticks or rights to other persons. When granting a conservation easement, an owner permanently places the uses of some sticks or rights on permanent restriction in order to advance a conservation purpose. The holder is given the right to ensure that these sticks or rights are never used, for example the right to subdivide, bulldoze the land or construct large buildings.

With a conservation easement, the owners generally aren't giving the holder the right to use the sticks; rather, they are giving the holder the right to enforce the restrictions on the use of certain sticks that the owners have placed on their bundle. Exceptions to this include when landowners choose to give to holders the right to build a trail or to enter the land to improve wildlife habitat.

## **Protecting the Waterway and its Surrounds**

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### **Every Parcel Makes a Difference**

It isn't possible to protect a waterway without protecting the land around it. Unlike conservation of large landscapes, where lack of protection on a few parcels may not matter to the big picture, runoff and erosion from even a few unprotected parcels along a high quality waterway can have a significant negative impact on its water quality. Thus, whether protection is to come from government regulations, purchase of land, conservation easements or other voluntary measures, the protections have to be accomplished across much of the waterway for substantial long-term water quality benefits to be achieved.

### **The Width of the Buffer**

There is no right answer to the question, "how much land is enough to set aside for waterway protection?" Although the land closest to the waterway will have the greatest impact on the waterway, the water quality benefits of protecting the land extend to the farthest reaches of the watershed. The greater the width of the riparian buffer, the greater the benefit.

The USDA Forestry Service takes the approach that the first 50 feet extending out from the waterway is the most critical and should be preserved as near as possible to an undisturbed, natural, state. This will assure that not only will the roots of trees, shrubs and grasses anchor the soil in place to minimize soil erosion but a thickly vegetated buffer along the waterway will slow the flow of stormwater, allowing an opportunity for sedimentation to take place before the stormwater reaches the waterway. An additional benefit of a vegetated buffer is the opportunity for stormwater to be absorbed into the

ground rather than discharging into the waterway. This not only benefits of the waterway but serves to recharge stored water resources underground.

## **Forming the Team to Collaborate on Protecting a Waterway**

Frequently a land trust, watershed association, or governmental agency reaches out to landowners along a waterway to generate interest in a waterway protection project. Other times a group of owners is concerned about the future of the waterway and wants to take steps to protect it. Owners who have participated in the Conservation Reserve Enhancement Program for a number of years may see the benefit of continuing to protect the waterway after the lease payment period has ended.

Watershed associations that do not hold conservation easements themselves may want to work with a land trust to protect a waterway with conservation easements. The [Model Riparian Buffer Protection Agreement](#) allows the watershed association to be named as a “Beneficiary” of the conservation easement, giving that organization the right to participate in enforcement of the conservation easement should the holder fail to do so.

## **Fundamental Elements of a Conservation Easement Project**

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### **Due Diligence in Preparing for the Conservation Easement**

The process of preparing for a conservation easement is much like the process of selling land. The prospective holder will want to make the same sorts of investigations that a prospective land purchaser makes. The types of investigations are summarized below and the costs associated with them are described in the guide [Costs of Due Diligence in Conservation Acquisitions](#).

#### **Title**

Title to the riparian buffer must be good and marketable and free of mortgages and other liens. While exceptions can occasionally be made when the conservation easement is wholly donated and no charitable contribution for federal income tax purposes is being claimed, the general rule is that mortgages must be released from the riparian buffer or subordinated to the conservation easement. For further information, see the guide [Mortgage Subordination](#) as well as the [Model Mortgage Subordination and Commentary](#).

#### **Survey**

Pennsylvania’s [Conservation and Preservation Easements Act](#) requires that 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 must be provided in the easement document.

If the riparian buffer is not to be defined as being within a certain distance of the waterway, a survey may be needed to establish the location. The [Model Riparian Buffer](#)

[Protection Agreement](#) measures the riparian buffer from the "Top of the Banks" of the waterway as defined in Article VIII of the document.

### **Environmental Assessment**

The prospective holder will want to obtain information about prior uses of the waterway and the riparian buffer. If any existing features or historic information raises a concern, additional investigation may result.

### **Appraisal**

If the conservation easement is being purchased, holder will almost always want an appraisal to support the amount being paid. Sometimes funding provided by government programs requires more than one appraisal or a review by a second appraiser of the work product of the first.

### **Baseline Documentation**

If owners want a contribution or bargain sale of a conservation easement to qualify as a charitable contribution for federal tax purposes, the Internal Revenue Code and Regulations (see §1.170A-14(g)(5) of the Regulations) require the owners to provide baseline documentation. However, baseline documentation is critical to the soundness of the conservation project, whether or not federal tax benefits are involved.

Practice 11B “Baseline Documentation Report” of [Land Trust Standards and Practices](#) states that:

For every easement, the land trust has a baseline documentation report (that includes a baseline map) prepared prior to closing and signed by the landowner at closing. The report documents the important conservation values protected by the easement and the relevant conditions of the property as necessary to monitor and enforce the easement. In the event that seasonal conditions prevent the completion of a full baseline documentation report by closing, a schedule for finalizing the full report and an acknowledgement of interim data [that for donations and bargain sales meets Treasury Regulations §1.170A-14(g)(5)(i)] are signed by the landowner at closing.

Common practice is for the holder to prepare the baseline documentation. The costs are described in the guide [Costs of Due Diligence in Conservation Acquisitions](#).

## **Preparing the Grant of Conservation Easement**

### **Use the Model**

The [Model Riparian Buffer Protection Agreement and Commentary](#), published and maintained by the Pennsylvania Land Trust Association (PALTA), provides users with a state-of-the-art legal instrument for granting a conservation easement specifically for the protection of a riparian buffer along a waterway. It includes an expansive commentary covering alternative and optional new provisions and the reasoning behind it all. The

model is written to achieve meaningful resource protection while being fair to both landowner and holder.

The model uses plain language and careful formatting to improve readability. User-friendliness, flexibility and best practices are key design elements. Although written to conform to Pennsylvania law, it is easily adaptable for use in other states.

If public access is desired as part of a conservation project, the model may be used in conjunction with the [Model Grant of Fishing & Boating Access Easement](#) or one of the model trail easements published by PALTA.

The second edition of the model was published in 2011 and shares a development platform with the 6th edition of the [Model Grant of Conservation Easement](#). This has enabled stakeholder feedback pertaining to each model to inform the improvement of the other. The [Model Grant of Conservation Easement](#) has been widely adopted by land trusts, local governments and landowner counsels in Pennsylvania as well as by many outside of Pennsylvania.

The model and commentary are the culmination of countless hours of research, discussion and drafting by the development team; feedback from users; review by easement professionals; and comments from workshop participants. The model is characterized by plain language, consistent form and easy-to-read formatting. It is structured in modular form to minimize cross-referencing and the potential drafting errors resulting from cross-referencing.

### **Conservation Objectives**

Both owners and holder need to focus upon the resources to be protected: not only *what* is being protected but *why*. The agreement of owners and holder on these matters forms the basis for the “Conservation Objectives” of the conservation easement (§1.03 of the [Model Riparian Buffer Protection Agreement](#)). Conservation Objectives are important for a number of reasons discussed in the commentary to the [Model Riparian Buffer Protection Agreement](#).

From the perspective of the holder, the Conservation Objectives are the reason holder is accepting the conservation easement; they form the rationale for the restrictions set forth in the grant of conservation easement, the restrictions that holder will enforce on the riparian buffer in perpetuity.

From the perspective of the owners, the restrictions set forth in the grant of conservation easement should demonstrably serve Conservation Objectives. The Conservation Objectives form the rationale if, in the future, owners propose to change the means set forth in the grant of conservation easement to achieve those ends.

### **Drafting the Grant**

After owners and holder come to agreement on the Conservation Objectives and the restrictions on the land that will serve those Conservation Objectives, it is time to prepare a draft of the grant of conservation easement. This task is greatly simplified by the

availability of the [Model Riparian Buffer Protection Agreement](#). Usually the first draft of the Grant is produced by holder or counsel for the holder.

## **Stewardship**

When accepting a conservation easement, a holder is responsible for ensuring the property's conservation values are protected in perpetuity; the holder must monitor and enforce the easement forever. Proper stewardship of conservation easements includes regular site monitoring trips, responding to landowners questions about the easement, maintaining positive relationships with landowners, building relationships with new landowners, ensuring easement violations are resolved, responding to landowners requests to exercise reserved rights, and amending the easement when necessary. The guide [Costs of Conservation Easement Stewardship](#) provides tools to estimate the costs of the stewardship activities. The [Model Conservation Funding Covenant and Commentary](#) provides a tool for meeting long-term stewardship costs.

## **Related Guides**

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[Conservation Easement](#)

[Costs of Conservation Easement Stewardship](#)

[Costs of Due Diligence in Conservation Acquisitions](#)

[Model Conservation Easement](#)

[Mortgage Subordination](#)

[Pledges and Donation Agreements](#)

[Stewardship Fees: Binding Present Owners to Future Promises](#)

## **Library**

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### **Related Library Categories at ConservationTools.org**

[Conservation Easements](#)

### **Featured Library Items at ConservationTools.org**

Visit <http://conservationtools.org/libraries/1/topics/77> to view these items and more:

- [Model Riparian Buffer Protection Agreement](#)
- [Model Grant of Conservation Easement](#)
- [Model Grant of Fishing & Boating Access Easement](#)
- [Model Trail Easement Agreement](#)
- [Model Donation Memorandum and Commentary](#)
- [Model Conservation Funding Covenant and Commentary](#)

## **Experts**

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Loza managed PALTA's riparian buffer protection agreement program.

## Disclaimer

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## Acknowledgements

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Andy Loza is the primary author, and [Patricia L. Pregmon](#), attorney at law, is the contributing author.

The Pennsylvania Land Trust Association prepared this guide with support from the Growing Greener Programs of the Pennsylvania Department of Environmental Protection and the Pennsylvania Department of Conservation and Natural Resources, Bureau of Recreation and Conservation, as well as the William Penn Foundation.



### Submit Comments and Suggestions

The Pennsylvania Land Trust Association would like to know your thoughts about this guide: Did we miss issues? Do any subjects need clarification or expansion? Other concerns? Please contact Andy Loza at 717-230-8560 or [aloza@conserveland.org](mailto:aloza@conserveland.org) with your thoughts. Thank you.

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