

Model Riparian Buffer Protection Agreement and Commentary

Second Edition

Prepared by the
Pennsylvania Land Trust Association

with support from the

William Penn Foundation



and the Growing Greener programs of the

Pennsylvania Department of
Environmental Protection



and the

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Conservation and Natural Resources
Bureau of Recreation and Conservation



*Find the most recent edition of this document as well as other models
and guidance at ConservationTools.org and ConserveLand.org.*



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Commentary last updated – 6/30/2011

Introduction

The *Model Riparian Buffer Protection Agreement and Commentary* 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. User-friendliness, flexibility and best practices are key design elements.

The model uses plain language and careful formatting to improve readability. It is structured to help users avoid drafting errors when adapting it to their particular projects.

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 the Pennsylvania Land Trust Association.

New Edition

This is the second edition of the *Model Riparian Buffer Protection Agreement*, the first having been published in 2005. The 2nd edition 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.

Comments Requested

Help improve the next edition!

The Pennsylvania Land Trust Association welcomes suggestions for improving the clarity, flexibility and effectiveness of the model and commentary. Please share potential optional and alternative provisions and identify issues in need of further investigation. Comments may be directed to Andy Loza at aloza@conserveland.org.

Suite of Model Documents

The Pennsylvania Land Trust Association develops and maintains model legal documents and commentaries to assist landowners, conservation organizations and governments in completing conservation transactions:

Conservation Easements

- [Model Grant of Conservation Easement](#)
- [Model Riparian Buffer Protection Agreement](#)

Public Access Easements

- [Model Trail Easement Agreement](#)
- [Model Grant of Trail Easement](#)
- [Model Grant of Fishing & Boating Access Easement](#)
- [Model Fishing Access Agreement](#) (hybrid conservation and public access easement)

Supporting Model Documents

- [Model Mortgage Subordination](#)
- [Model Donation Memorandum](#)
- [Model Conservation Funding Covenant](#)

Users can review and download the latest editions of these and other models at ConservationTools.org and ConserveLand.org.

Acknowledgements

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Commentary to the Model Riparian Buffer Protection Agreement

alternatively referred to as the Commentary to the
Model Grant of Conservation Easement for Riparian Buffer Protection

Second Edition (2011)

General Instructions

- **Read the Commentary.** Users of the model should 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 model to make cross-referencing easy. Titles or captions in bold lettering preceded by numbers refer to sections of the same title in the model. 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 model and this commentary should not be construed or relied upon as legal advice or legal opinion on any specific facts or circumstances. The model must be revised to reflect the specific circumstances of the particular project under the guidance of legal counsel.
- **Start from the Model.** Avoid using a document prepared for another project as a starting point for a new conservation easement. One of the most important functions of a model is to serve as a reminder of issues that need to be considered. The value of a model is lost, and errors and omissions become virtually guaranteed, when a document prepared for another Property is used as a starting point for a new conservation easement. Each Holder should feel free to create its own version of the model by incorporating additional or alternative provisions (from the commentary or otherwise) that reflect the policies and preferences of that Holder. That version or the then-current version of the model available at ConservationTools.org and ConserveLand.org should be used as the starting point for each project. (Of course, it is important to update the Holder's version when changes are made to the model.)
- **Standards and Practices.** Any organization considering holding conservation easements should be aware of the guidelines contained in [Land Trust Standards and Practices](#) (referred to in this commentary as "S&P"). These voluntary standards and practices maintained by the Land Trust Alliance 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 applicable state, the box at the bottom of the signature page that begins "The model on which this document is based 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.
- **Identify Changes and Streamline Review.** A key advantage of the model is the streamlining of reviews. Widely used software enables users to quickly identify modifications in the terms set forth in the model. MS Word provides functions to track modifications that a user makes to the model or compare a modified

document to the original document. Search under Word's Help menu for the terms "track changes" or "compare documents" for instructions specific to the particular version of the software.

- **Updates.** Check ConservationTools.org or ConserveLand.org periodically for updates to the model.

Preliminary Matters

Margins

- Minimum margin requirements vary among counties; however, a typical requirement is a 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. The model is formatted to conform to these requirements.

Recording Office Information

- There is a trend for County recording offices to require information identifying the preparer (including both address and telephone number), the name and address of the person to whom the document is to be returned, and the tax parcels of the real estate to which the document pertains. The model is formatted to conform to these requirements. If unneeded or undesirable in a particular county, delete the text but keep the lines in order to preserve a 3-inch margin at the top of the first page.
- Pennsylvania law does not require that a lawyer or law firm be identified as the preparer of the document; however, legal review is required for conformance with S&P. See note "Get Legal Counsel" above. Users should not identify a lawyer as the "preparer" if the lawyer did not, in fact, prepare the particular document or was not given the opportunity to review all of the changes made to the document. Lawyers and other professionals, such as architects and engineers, are legally and professionally responsible for the work they produce for clients. It is legally and ethically improper to represent to the public that a legal document, survey plan or architectural drawing is the work product of a professional if it has been changed without the knowledge or consent of that professional.

Title of Document

- The 2nd edition re-titles the document "Grant of Conservation Easement for Riparian Buffer Protection" so that the title more accurately reflects the nature of the document. The first edition used the title "Riparian Buffer Protection Agreement".
- The most accurate title is "Grant of Conservation Servitude" but that has not been adopted in the model because, while the term "conservation servitude" has been advanced by the panel of respected practitioners and scholars compiling the Third Restatement of Servitudes, it remains unfamiliar to the general public and many attorneys. The title "Grant of Conservation Servitude" properly suggests all of the following:
 - The document operates as an instrument conveying a real property interest to Holder. The document is not, itself, the interest that is granted.
 - The interest conveyed is a servitude: an interest that binds the land but does not give the grantee of the interest any rights of possession or ownership.
 - A variety of servitudes may be created by the document: covenants restricting the use of the land; affirmative rights to enter the land for inspection purposes; powers of enforcement to compel compliance with the restrictive covenants (sometimes referred to as a "negative easement"); and, if desired, other affirmative rights to enter the land for conservation, resource management, recreation or other purposes.
 - The law of servitudes, not the law applicable to contracts or trusts, should be applied to interpret the meaning and operation of the document.
- Some users prefer the title "Grant of Conservation Easement and Declaration of Covenants" which is acceptable.

- The title “Deed of Grant of Conservation Easement and Declaration of Covenants” is sometimes used; however, this title may result in confusion with deeds conveying fee simple title and, as it is unnecessary to describe the type of grant, one of the other options is preferable.
- The title “Land Conservation Agreement” is a possible alternative. Avoiding the word “easement” eliminates a potential misinterpretation. Those unfamiliar with conservation easements sometimes mistakenly believe that an easement in the nature of a right-of-way is being granted. On the other hand, substituting the word “agreement” is also problematic. The term suggests that a conservation easement is a contract rather than a conveyance and that mistake can result in a number of unintended consequences. For further information, see [“What is a Conservation Easement?”](#).

OPTIONAL:**Other Captions**

- **Purpose.** A bold caption in the heading of the document that highlights particular features of the Grant lessens the chance that subsequent Owners will claim they were unaware of the features when they purchased the conserved land.
- **Not Legally Necessary.** Pennsylvania law provides that subsequent Owners have notice of every term and provision included in the Grant if it has been properly recorded in the land records of the county in which the conserved land is located. As a legal matter, it does not make any difference whether or not subsequent Owners were actually aware of a particular provision. Nevertheless, as a practical matter, a bold caption may serve to make a purchaser or a settlement agent better aware of particular features of the Grant.
- **Caption re: Notice of Transfer.** The most frequently violated clause in grants of conservation easement appears to be the requirement to notify Holder of the transfer of the Property. To place added emphasis on this requirement, a large, bold caption can be added to the heading of the document, for example, “Notice of Transfer Required: See Article II.”
- **Captions re: Notice of Transfer Fee or Stewardship Contribution.** A growing number of grants of conservation easement provide for transfer fees and other stewardship contributions. (For information on transfer fees and other stewardship contributions, see the guide [Stewardship Fees: Binding Present Owners to Future Promises](#) and the accompanying [Model Conservation Funding Covenant](#).) Examples of succinct notices regarding these fees and contributions include the following:

Fee of \$_____ is due on transfer of Property.

Transfer Fee is waived/reduced by __% upon compliance with Notice of Transfer requirements.

This Grant requires payment of Stewardship Contributions. See Conservation Funding Covenant recorded immediately after this Grant.
- **Caption re: Public Access.** Some grants of conservation easement include a grant of an affirmative right of public access. If so, Holders (and Beneficiaries) may want to accentuate this feature with a caption such as the following:

Grant of right of public access included. See Article V and Grant of Fishing & Boating Access Easement recorded immediately after this Grant.

Opening Recital

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

Easement 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 “Easement 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 Easement Date must join in the Grant to be effective under Applicable Law and to qualify as a Qualified Conservation Contribution under §1.170A-14(b)(1) of the Regulations.
- 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 Easement, 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.
- The model has been constructed to use the term “Owners” rather than “Grantor” or “Grantors”. This term was chosen to avoid any confusion about whether specific provisions were intended to apply only to the Persons signing the document or to subsequent owners of the Property as well. If a provision is intended to apply only to the Person signing the Grant, the phrase “the undersigned Owner or Owners” is used. In this limited case, some users may prefer substituting the term Grantor or Grantors for the phrase “undersigned Owner or Owners” where this phrase is used in the model. 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.
- “Grantee” may be substituted for “Holder” but is not recommended for several reasons. First, the term “Holder” avoids any possible confusion in the future between the land trust or government unit that signed the document and a subsequent transferee who becomes the “Holder” but was never the “Grantee” of the original document. The second reason is that the terms Owners and Holder are more distinctive and recognizable than Grantor and Grantee whose similarity in spelling can sometimes be confusing.
- Other parties to the document can be added here, if desired; however, the model has been constructed to name additional “Beneficiaries” (if any) in Article I. It is not necessary for purposes of giving public notice of the content of the document to name additional Beneficiaries in the opening paragraph.

Amendment and Restatement

- **Reference.** For instructions on amending and restating a Grant of Conservation Easement, see the “Amendment and Restatement” section of the commentary to the *Model Grant of Conservation Easement*.

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.
- **Whereas Clauses.** The content of Article I can be restated as a series of “Whereas” clauses; however, modern legal practice is to state the facts supporting the intentions of the parties in a “Background” section. The facts are then set out as simple declarative sentences rather than a series of “whereas” clauses conjoined with a series of “ands”.

1.01 Property

- **Purpose.** The purpose of this section is to identify the land that will be bound by the terms of the Grant.
- **S&P.** Practice D. of Standard 9 of S&P requires that the land trust determine the boundaries of every protected property through legal descriptions, accurately marked boundary corners or, if appropriate, a survey.
- **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”.
- **Acreage:** Insert the number of acres comprising the Property.

1.02 Riparian Buffer

- The Grant defines the Riparian Buffer as “the strips of land stretching ___ feet landward from the Top of Banks of _____ (the “Waterway”), together with the banks and bed of the Waterway...” 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 Waterway or both sides.
- This description creates a Riparian Buffer that moves with the Waterway if the Waterway should meander. This supports a key purpose of the Grant – to protect the water resources – wherever the Waterway 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 Waterway 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 and Preservation 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 Waterway 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 Waterway 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 (to be typed in the document by users) of the strips of land stretching landward from the Top of Banks of the Waterway may be any width but should be as wide as is acceptable to the Owners who enter into the Grant and, in any event, not less than thirty-five (35) feet. A 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 Natural Resource Conservation Service standards at <http://www.nrcs.usda.gov/technical/Standards/nhcp.html> and DCNR guidance at <http://www.dcnr.state.pa.us/wlhabitat/forest/riparian.aspx>.
- 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 VIII.

1.03 Conservation Objectives

- **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. Fourth, if the Grant becomes the subject of litigation, it will help inform the court of the rationale underpinning particular covenants or higher standards applicable to particular areas. Last, this section (together with public policy statements) will help support (if otherwise applicable) an undersigned Owner's claim of a charitable deduction for a Qualified Conservation Contribution.
- **S&P.** Standard 8. Practice F. of S&P requires the land trust to document the condition of the important conservation values on the property and to reveal potential threats to those values.
- **Elaborate.** Expand §1.03 to include a brief description of the water resources, wildlife and other resources to be protected and enhanced by the Grant. Examples:

The Property is traversed for approximately ___ feet by ___ Creek. The ___ Creek 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. The creek is a tributary of ___ River, a source of drinking water for the ___ area.

The Riparian Buffer is covered by a canopy of mixed hardwoods primarily of Native Species including the following: _____. Layered under the canopy are woody perennials such as _____ and herbaceous materials such as _____.

The Riparian Buffer contains approximately ___ acres of unbroken, deep woods habitat within which the following Native Species have been observed: _____. The edge between the woodlands and field areas provides cover for species adapted to more sunlight such as _____. The following rare or endangered species have been observed on or about the Property: _____.

- **Different Goals and Protections.** The model was prepared under the assumption that the Conservation Objectives are consistent across the Riparian Buffer. For projects that require substantially different Conservation Objectives and associated restrictive covenants for different portions of a project area, the options and flexibility provided by the *Model Grant of Conservation Easement* make it the better choice of model documents.

1.04 Baseline Documentation

- **Purpose.** The purpose of this section is to incorporate the Baseline Documentation into the text of the Grant 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 Grant between Owners and the Holder dated _____.
- **Necessity.** 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.
- **Preparation.** Common practice is for the Holder to prepare the Baseline Documentation; however, under the Regulations it is the obligation of donor (the undersigned Owner or Owners) to make available to donee (the Holder) *prior to the time the donation is made*, documentation sufficient to establish the condition of the Property as of the Easement Date.
- **Items Included.** According to the Regulations, the documentation *may* include: (A) USGS maps, (B) map of the area drawn to scale showing Existing Improvements, vegetation and identification of flora and fauna, land use history (including present uses and recent past disturbances) and distinct natural features such as large trees and aquatic areas; (C) aerial photograph at an appropriate scale taken as close as possible to the Easement Date; (D) on-site photographs taken at appropriate locations on the Property. The on-site photographs should be keyed to a location map of the Property and dated and signed by the photographer. To monitor restrictions on the Standard Protection Area properly, Baseline Documentation in support of a donation of a Conservation Easement based upon the model should include a computation (individually and in the aggregate) of Impervious Coverage of Existing Improvements within the Standard Protection Area as of the Easement Date.
- **S&P.** Standard 2. Practice D. of S&P provides that land trusts should adopt “a written records policy that governs how organization and transaction records are created, collected, retained, stored and disposed.” Among the critical records covered by the policy are the baseline documentation reports for all conservation easements held by the land trust. Standard 9. Practice G. provides that pursuant to its records policy, the land trust must keep originals of all irreplaceable documents essential to the defense of each transaction in one location and copies in a separate location. Original documents should be protected from daily use and are secure from fire, floods and other damage. Baseline documentation should also include a report of the steps taken by the land trust to identify and document whether there are hazardous or toxic materials on or near the property. Land trusts are required to take these steps, as appropriate for the project,

to conform to Standard 9. Practice C. of S&P. Standard 11 Practice B requires 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. 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 acknowledgment of interim data that for donations meets Regulations are signed by landowner at closing.

1.05 Structure of Grant

- **Purpose.** The purpose of this section is to give a reader unfamiliar with conservation easements in general or this model in particular, a sense of the organizing principles on which it is based.
- **Order of Articles.** It is important to note that it is the undersigned Owner (not the Holder) who establishes the restrictive covenants on the Property (Articles II, III and IV). Many forms start with the “grant of a conservation easement” and follow with the restrictive covenants but this is illogical. There’s nothing to grant until Owners establish the restrictive covenants. Under the model, Owners grant to the Holder the right to enforce the restrictive covenants under Article V.
- **Glossary.** Another key point in this section is to direct the reader to Article VIII for definitions of initially capitalized terms used in the Conservation Easement that are not defined in Article I. Some users may prefer labeling Article VIII “Other Defined Terms” rather than “Glossary” so as to reaffirm the legally binding nature of the definitions set forth in that Article.

1.06 Federal Tax Items

- **Reference.** See the commentary to the *Model Grant of Conservation Easement* for explanations and guidance regarding this section.
- **Tax Benefits.** If the document is intended to meet the requirements for the grant of a qualified conservation contribution under the federal tax code, or, put another way, if the Owner or Owners might want to take advantage of federal tax benefits, replace the model’s default text with the following subsections:
 - (a) **Qualified Conservation Contribution**
The Conservation Easement has been donated in whole or in part by the undersigned Owner or Owners. The donation of the Conservation Easement by this Grant is intended to qualify as a charitable donation of a partial interest in real estate (as defined under §170(f)(3)(B)(iii) of the Code) to a qualified organization (a “Qualified Organization”) as defined in §1.170(A-14(c)(1) of the Regulations. If the Conservation Easement is transferred to any Person, that Person must commit to hold the Conservation Easement exclusively for conservation purposes as defined in the Regulations.
 - (b) **Public Benefit**
The undersigned Owner or Owners have granted the Conservation Easement to provide a significant public benefit (as defined in §1.170A-14(d)(4) of the Regulations). In addition to the public benefits described in the Conservation Objectives, the Baseline Documentation identifies public policy statements and other factual information supporting the significant public benefit of the Conservation Easement.
 - (c) **Mineral Interests**
No Person has retained a qualified mineral interest in the Property of a nature that would disqualify the Conservation Easement for purposes of §1.170A-14(g)(4) of the Regulations. From and after the Easement 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 Regulations**
To the extent required for compliance with §1.170A-14(g)(5)(ii) of the Regulations, and only to the extent such activity is not otherwise subject to Review under this Grant, Owners agree to notify Holder before exercising any reserved right that may have an adverse impact on the conservation interests associated with the Property.

(e) Property Right

In accordance with §1.170A-14(g)(6) of the Regulations, the undersigned Owner or Owners agree that the grant of this Conservation Easement 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 the Conservation Easement as of the Easement Date bears to the value of the Property as a whole as of the Easement Date (the “Proportionate Value”). If the Proportionate Value exceeds the compensation otherwise payable to Holder under Article VI, Holder is entitled to payment of the Proportionate Value. Holder must use any funds received on account of the Proportionate Value for conservation purposes (as that phrase is defined in the Regulations).

(f) Qualification under §2031(c) of the Code

To the extent required to qualify for exemption from federal estate tax under §2031(c) of the Code, and only to the extent such activity is not otherwise prohibited or limited under this Grant, Owners agree that commercial recreational uses are not permitted within the Property.

(g) Acknowledgment of Donation

Except for such monetary consideration (if any) as is set forth in this Article, Holder acknowledges that no goods or services were received in consideration of this Grant.

(h) No Representation of Tax Benefits

The undersigned Owner or Owners represent, warrant and covenant to Holder that:

- (i) The undersigned Owner or Owners have not relied upon any information or analyses furnished by Holder with respect to either the availability, amount or effect of any deduction, credit or other benefit to Owners under Applicable Law; or the value of the Conservation Easement or the Property.
- (ii) The undersigned Owner or Owners have relied solely upon their own judgment and/or professional advice furnished by the appraiser and legal, financial and accounting professionals engaged by the undersigned Owner or Owners. If any Person providing services in connection with this Grant or the Property was recommended by Holder, the undersigned Owner or Owners acknowledge that Holder is not responsible in any way for the performance of services by these Persons.
- (iii) This Grant is not conditioned upon the availability or amount of any deduction, credit or other benefit under Applicable Law.

ADDITIONAL SUBSECTION, IF APPLICABLE:

- The following provision should be inserted if the undersigned Owner otherwise qualifies as a “qualified farmer or rancher” under the Pension Protection Act of 2006; i.e., a taxpayer who earns more than 50% of his or her gross income from the business of farming in the taxable year in which the conservation contribution is made. A qualified farmer or rancher may deduct the conservation easement value up to 100% of their Adjusted Gross Income for up to 15 years.

(i) Qualification under Pension Protection Act of 2006

To the extent required to qualify the undersigned Owner or Owners as a “qualified farmer” or “qualified rancher” under applicable provisions of the Pension Protection Act of 2006 and subject to applicable limitations set forth in this Grant, the Property must be used, or available for use, for agricultural or livestock production.

1.07 Beneficiaries

- **Purpose:** The purpose is to identify (and limit) the universe of Persons having a “third-party right of enforcement” defined in the Conservation and Preservation Easements Act as follows: “[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.”

- **Rights.** The particular rights each Beneficiary, if any, has with respect to the Property are set forth in Article V.
- **Acceptance.** The Conservation Easement Act requires Beneficiaries to sign the Grant (or record a separate document of acceptance) to evidence their acceptance of the rights and duties. The text of the relevant provision of the Conservation Easements Act is as follows:

No right or duty of a holder, successive holder named in the conservation or preservation easement or person having a third-party right of enforcement may arise under a conservation or preservation easement before the acceptance of the easement by the holder, successive holder or third party with right of enforcement and recordation of the acceptance.

- Several points need to be made concerning the statutory provision. First, the acceptance does not have to be made a part of the initial Grant but can be recorded later if and when the need arises for the Beneficiary to enforce its rights under the Grant independent of the Holder. For example, the Beneficiary wants to replace the Holder for failure to exercise its rights vested by the Grant. Second, the specific rights set forth in the Grant 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 a Conservation Easement, then the land trust is contractually bound to seek County approval whether or not County has recorded an acceptance.
- **Reference.** See the commentary to the *Model Grant of Conservation Easement* for a more expansive approach to identifying Beneficiaries.

1.08 Consideration

- **Purpose.** The purpose of this section is to set forth the amount of consideration (if any) being paid for the Grant. 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.
- **Acknowledge Receipt.** In [Randal A. Schrimsher et ux. v. Commissioner; T.C. Memo. 2011-71; No. 945-09 \(27 Mar 2011\)](#), the Tax Court disallowed a charitable deduction of a facade easement because the letter acknowledging the donation failed to take into account the consideration recited in the document (\$10 and other good and valuable consideration). Either the acknowledgment letter must state “no goods and services were received on account of this donation other than \$1.00 nominal consideration stated in the Grant” or change §1.08 to delete “receipt of \$1.00 in consideration of the grant” and substitute “that no consideration was received for the grant.”
- While not strictly necessary because the material is covered in Article VII and the closing recitation of the model, the following recitation can be added to §1.08 to be sure that there is no question that what follows is, and is intended to be, the legally binding agreement of the parties:

The undersigned Owner or Owners and Holder intend to be legally bound by this Grant and agree to its terms.

ADDITIONAL SECTION, IF APPLICABLE:

1.09 Conservation Funding Covenant

- **Purpose.** To incorporate into the Grant reference to the Conservation Funding Covenant recorded immediately after the Grant. For a variety of reasons set forth in the guide [Stewardship Fees: Binding Present Owners to Future Promises](#), a separate document that not only evidences, but also secures, the obligation to fund stewardship periodically, or upon triggering events such as transfer, is preferred to inserting terms of commitment to future funding in the Grant. The [Model Conservation Funding Covenant and Commentary](#) is available at [ConservationTools.org](#). Reference can be inserted into the Grant as follows.

The undersigned Owner or Owners have covenanted to fund stewardship of the Conservation Easement vested in Holder by this Grant after the Easement Date under the terms set forth in the Conservation Funding Covenant recorded immediately after this Grant.

- **Alternative.** Section 2.01 of the commentary provides options for including future funding commitments in the Grant.

ADDITIONAL SECTION, IF APPLICABLE:

1.10 Administrative Agent

- **Reference.** This item is unlikely to be needed in the context of riparian buffer protection. *See* the commentary to the *Model Grant of Conservation Easement* for a discussion.

ADDITIONAL SECTION, IF APPLICABLE:

1.11 Owners' Representations

- **Purpose.** To assure Holder that the undersigned Owner or Owners have not concealed or failed to disclose any pertinent information on which Holder is relying when Holder accepts the Conservation Easement.
- **Timing.** The optimal time to obtain representations about the Property is at the beginning of the relationship before Holder invests time and resources in the project, not at the signing of the Grant.
- **ConservationTools.org.** The [Model Donation Memorandum and Commentary](#) includes, in the paragraph captioned "Reliance", a list of factual statements that the potential donor verifies are accurate or, if they are not, the donors are given the opportunity to disclose anything known to them that must be disclosed in order to make the statement correct.
- **Reaffirmation.** If the Holder has previously obtained representations from the undersigned Owner or Owners, it may want to reaffirm that the information has not changed as of the Easement Date. That assurance may be furnished by a written certificate signed by the undersigned Owner or Owners and delivered to Holder at the closing or it can be inserted into the Grant as follows:

The undersigned Owner or Owners confirm that the information they or their agents and representatives have furnished to Holder in connection with the preparation of this Grant, including the representations set forth in the [Donation Memorandum] dated ____, is complete and accurate as of the Easement Date.

- **Representations.** Some Holders prefer to include representations in the text of the Grant, which is also acceptable. The list set forth in the Donation Memorandum, or other representations about the Property and its compliance with Applicable Laws, including environmental laws, can be adapted for this purpose. To avoid duplication, note that §1.06 of the model (captioned "Federal Tax Benefits") includes representations pertaining to that subject matter and §5.01(b) includes a representation about the absence of Liens on the Property. It should also be noted that the indemnity furnished in §7.09 includes any Losses or Litigation Expenses suffered by Holder as a result of a violation of Applicable Laws (including environmental laws) pertaining to the Property.

ADDITIONAL SECTION, IF APPLICABLE:

1.12 Owners' Control

Owners reserve all rights and responsibilities pertaining to their ownership of the Property but for the rights specifically granted to Holder (and Beneficiaries, if applicable) in this Grant.

- **Purpose.** 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 the Grant.

Article II. Restrictive Covenants: Transfer; Subdivision

2.01 Transfer

(a) Notice Required

- **Purpose.** The purpose of this section is to regulate transfer of ownership of the Property or portions of the Property. Holder must be kept informed of the names and address for notices of the then-current Owners so as to be in a position to administer the Conservation Easement properly and, if necessary, exercise the rights granted to Holder by the Grant.
- **S&P.** Standard 11 Practice D. of S&P requires the land trust to establish and implement systems to track changes in land ownership.

(b) Prior to Transfer

- **Purpose.** To permit Holder to contact participants in the transaction -- brokers, attorneys, title companies, prospective purchasers -- to be sure they are aware of the Grant, including requirements applicable to transfer and, perhaps, existing uncured violations. This avoids allegations that, by doing so, Holder interfered with Owners' sales transaction.
- **Educational Opportunity.** An important function of the pre-transfer notice is to give Holder the opportunity to contact the prospective post-transfer Owners to explain the terms and operation of the Grant and answer any questions they may have.
- **Pre-transfer Inspection.** All of the participants in the transfer benefit when the written report of Holder's recent inspection is available prior to the transfer:
 - i. Purchasers typically inspect the physical condition of real property and its compliance with Applicable Laws before committing to acquiring it. They want to know that they will not be taking on a pre-existing liability or defect. Requesting a pre-transfer inspection by Holder serves the same purpose: to assure the prospective Owners, and their mortgage lenders, that no violations of the Grant have been reported and remain uncured.
 - ii. The pre-transfer Owners also benefit by requesting a pre-transfer inspection because, if the report is "clean" or, if not, reported violations are cured prior to transfer, they are in a position to refute allegations of violations commenced or continuing during their period of ownership. The post-transfer Owners must cure but they may want to compel the pre-transfer Owners to bear some or all of the cost to cure if the violation predated their ownership.
 - iii. Holder has the opportunity to see that the Riparian Buffer is brought into compliance with the Grant prior to transfer, or satisfactory arrangements for a post-transfer cure are made, and that the pre-transfer Owners satisfy any outstanding financial obligations to Holder on or before the transfer date.

(c) Ending Continuing Liability

- **Purpose.** To furnish an incentive to Owners to comply with the notice and other provisions of this section.
- **Joint and Several.** If Holder is not furnished with notice of transfer and an opportunity to inspect, then all of the Owners, both pre-transfer and post-transfer, are "on the hook" for correction of a violation or other failure to comply, whether such non-compliance commenced before or after the date of transfer. The rationale is that, until such time as Holder has been given notice and the opportunity to inspect, Holder has the right to look to either or both the pre-transfer Owners (as shown on Holder's records) and the post-transfer Owners (as shown on the Public Records) for correction of violations. Once that procedure is satisfied, the pre-transfer Owners no longer bear the risk of liability for a violation caused by the post-transfer Owners. This does not mean that the pre-transfer Owners are relieved from liability to Holder for violations occurring or continuing during their period of ownership. If that is desired, and the Holder agrees, the following can be added to the end of §2.01(c):

If Holder's inspection report verifies that the Riparian Buffer was at that the time of transfer, or applicable date of later inspection, in compliance with this Grant, the pre-transfer Owners are

thereafter relieved of liability for violations of this Grant discovered after issuance of such inspection report.

- **Other Remedies.** If proper notice of transfer has not been given, should the Holder seek court intervention to delay or, perhaps, even set aside a non-compliant transfer? The risk Holder takes in pursuing that course of action is the high probability that both the pre-transfer and post-transfer Owners will assert a claim against Holder for the losses and litigation expenses incurred as a result of Holder's unwarranted intrusion into their private contractual arrangement. In the likely event that the court finds that Holder did not meet its high standard of urgent necessity to intervene in the transfer, then Holder has not only lost but has exposed itself to the possibility of a substantial judgment in favor of Owners.

ADDITIONAL SECTION, IF APPLICABLE:

(d) Conservation Funding Covenant

- **Purpose.** To evidence the obligation of Owners to fund stewardship over time. For the reasons described in the guide [Stewardship Fees: Binding Present Owners to Future Promises](#), Holder can face challenges collecting outstanding obligations from subsequent Owners following transfer. The following section is intended to assist Holder in doing so.
- **Alternative.** Section 1.09 of the commentary provides for the *preferred alternative* of addressing future funding obligations in a separate but referenced Conservation Funding Covenant.
- **ConservationTools.org.** For an explanation of the issues that may arise when Holder seeks to collect financial obligations from the original Owners or Owners who did not, themselves, make the promise to pay or agree to honor the promise to pay, see the guide [Stewardship Fees: Binding Present Owners to Future Promises](#).
- **Terms.** The terms might implement any one or more of the funding strategies discussed in the guide [Stewardship Fees](#); for example:

(e) Conveyance Contribution

Upon each Transfer, the Owners prior to Transfer must pay the sum of \$_____ (the "Conveyance Contribution") to Holder not later than the date of Transfer. The Conveyance Contribution is intended to compensate Holder for its reasonable costs and expenses typically incurred in making itself available for consultations with prospective purchasers and other Persons pertaining to a Transfer, performing a pre-transfer inspection of the Property, and issuing its report of the results of such inspection. The Conveyance Contribution is to be adjusted as needed to maintain equivalent value with the U.S. Dollar as of the Easement Date. "Transfer" is defined as follows: a) the direct or indirect sale, agreement to sell, assignment or conveyance of the Property or any portion of the Property; and b) if a majority ownership interest in, or control of, the Property is changed as a result, the transfer of stock, partnership or other ownership interests in any one or more of the Owners. The occurrence of any of these events is a Transfer whether or not it is voluntary, involuntary, by operation of law, or otherwise.

For consistency, add "Conveyance Contribution" and "Transfer" to Article VIII, each with the following cross-reference: "The term is defined in Article II".

ADDITIONAL SECTION, IF APPLICABLE:

(f) Financial Obligations

Owners authorize the attorney or other Person handling closing of a transfer of ownership of the Property or any Lot to withhold, from funds otherwise payable to Owners as a result of the transfer, the sums (if any) required to satisfy obligations to Holder then outstanding or which become due upon transfer as set forth above in this section or otherwise itemized by Holder in its statement rendered to Owners.

- **Purpose.** To increase the likelihood of payment to Holder, particularly if no Conservation Funding Covenant secures these obligations.

- **Costs and expenses.** Holder is entitled to recoup its reasonable costs and expenses incurred in connection with the transfer including the pre-transfer inspection under the terms of §5.05.

ADDITIONAL SECTION, IF APPLICABLE:

(g) Failure to Timely Inspect

- **Owners' Concern.** Some Owners want Holder to be responsible for prompt compliance with its duty to inspect upon receipt of Owners' notice of intended transfer. The following provision can be added to §2.01 to address those concerns:

It is the responsibility of Holder to inspect the Property and report to Owners the results of its inspection within thirty (30) days following receipt of notice from Owners of the intended transfer. If Holder fails to do so within the 30-day period, Owners are deemed to be in compliance as of the date of their notice to Holder.

2.02 Subdivision

(a) Prohibition

- **Purpose.** To avoid the enforcement problems and stewardship costs arising from a multiplicity of owners.
- **Broad Prohibition.** The broad prohibition (including the definition of Subdivision in Article VIII) is intended to cover any kind of separation of ownership or control within the Riparian Buffer.

(b) Permitted

- **Purpose.** The list in §2.03 should be the universe of permitted exceptions from the general prohibition in §2.02.
- **Separate Riparian Buffer.** The entirety of the Riparian Buffer may be separated from the remainder of the Property subject to Review. Among other Review items, Holder will want to see that the Riparian Buffer will be transferred to a responsible Owner, perhaps a governmental entity or fishing club, who will have the incentive to keep the Riparian Buffer in its natural condition even though no dwelling or other Improvements may be permitted.
- **Transfer of Care, Custody and Control.** The model permits the transfer of care, custody and control (but not ownership) of portions of the Riparian Buffer for permitted activities and uses. This is permitted subject to Review to confirm that the rights granted are consistent with the Conservation Easement. An example is a lease for the extraction of natural gas using horizontal drilling with no surface disturbance. Greater latitude is provided for division of the Property by lease (but not for transfer of ownership) because Holder's administrative burden is not increased to the same extent as when Property is divided into multiple parcels with multiple Owners.
- **Reference.** See Article II of the *Model Grant of Conservation Easement* and the commentary to the same for other options for addressing Subdivision issues.

Article III. Restrictive Covenants: Improvements

- **Purpose.** To control the size and location of Improvements consistent with Conservation Objectives.

3.01 Prohibition

- **Purpose.** The purpose of the prohibition is to assure that the list of permitted items set forth below in this Article comprise the universe of Improvements permitted within the designated area.
- **Guides to Interpretation.** The definition of Improvements in Article VIII covers all man-made buildings, structures and facilities.

- **Examples.** A man-made pond is an Improvement; a naturally occurring lake is not. A berm created by earth-moving equipment is an Improvement; a naturally occurring feature is not. Dirt roads and riding rings are considered Improvements. Agricultural fields are not considered Improvements even if “man made” by removing vegetation.

3.02 Permitted

(a) Existing Improvements

- **Purpose.** Existing Improvements are always permitted to remain in their existing locations as of the Easement Date wherever they may be within the Riparian Buffer.

(b) Existing Agreements

- **Purpose.** Existing Agreements are entitled to priority over the Conservation Easement 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 Grant. A prospective Holder must review Existing Agreements to determine whether the exercise of rights under the Existing Agreement will be detrimental to Conservation Objectives and, if so, what the likelihood is of that happening.
- **Modification of Existing Agreement.** A prospective Holder might want to condition its willingness to accept a Conservation Easement upon receipt of a modification or supplement to the Existing Agreement that would bring the exercise of rights under the Existing Agreement into conformity with applicable restrictions contained in the Grant.

(c) Additional Improvements

- **Customize.** The model’s list of permitted Additional Improvements and indication of items “subject to Review” is intended to be appropriate to many conservation projects; however, it is not expected to be the perfect match for every project. Users should customize the list to meet their particular circumstances.
- **Expanding the List.** The list may be expanded; however, Additional Improvements should be limited to those that the Holder has determined are consistent with Conservation Objectives.
- **Review.** Items that are “subject to Review” are subject to the review and approval process described in §5.04. Different Holders may have different interests and practices regarding which items should and should not be subject to Review. If a Holder judges that a type of Additional Improvement has particularly high potential to be problematic, the Holder may wish to have the document state that Holder, “without any obligation to do so”, must determine that the Additional Improvement is “consistent with the maintenance or attainment of Conservation Objectives”. See the commentary to §5.04 for further discussion.
- **Limitations.** Because the list of Additional Improvements 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 Article III of the *Model Grant of Conservation Easement* applicable to Improvements within the Standard Protection Area.
- **Trails.** 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 §3.02(c)(ii) includes paths covered by gravel, stone or wood chips.
- **Improvements for Oil and Natural Gas.** In areas of the Commonwealth in which deposits of oil and natural gas can be found, Holders are often willing to permit extraction of these sources of energy, particularly if the extraction is implemented by horizontal or lateral extension of Improvements at substrata depths that pose no likelihood of harm to Conservation Objectives. The model adopts the approach taken by many users allowing wholly subsurface extraction of oil and natural gas from all areas of the Property. The rationale is that there is little if any effect on natural or scenic resources described in Conservation Objectives and, if not permitted, the Owners could lose their right to obtain compensation for the natural

gas beneath their Property that is captured by Improvements located outside their Property. Surface Improvements, however, are treated as inconsistent with Conservation Objectives.

- **Geothermal Energy.** Improvements used to generate geothermal energy could be installed wholly underground by lateral extension from locations outside the Riparian Buffer. If Holder concludes, after Review, that Improvements such as these do not impair resources intended to be protected as set forth in Conservation Objectives, they can be permitted.

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

- **Purpose.** To control intensity of use of land and disturbance of natural resources identified in the Conservation Objectives.
- **No Affirmative Obligation.** The Grant 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.

4.01 Prohibition

- **Purpose.** The purpose of the prohibition is to assure that the list of permitted items set forth in this Article comprise the universe of activities, uses and disturbances permitted within the Riparian Buffer.
- **Intensity or Frequency.** Some Owners object to the further limitation on permitted activities and uses to those that do not, by their intensity or frequency, adversely affect Conservation Objectives. The difficulty in trying to accommodate this objection is that any activity or use can damage natural or scenic resources and there is usually no way to quantify the answer to the question “how much is too much”? Equestrian activities may or may not cause turf to disintegrate and expose bare soil that erodes into the nearby stream. In any case, the burden will be on Holder to show that the intensity and/or frequency of the use is the proximate cause of a specific material adverse effect on Conservation Objectives. A statement to that effect could be added, if necessary, to help overcome Owners’ anxiety.

4.02 Permitted

(a) 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. Holders should obtain title information to determine what rights Persons have to disturb natural resources within the Property by exercise of rights under Existing Agreements. *See* commentary to §3.02(b) for a discussion of the concerns of Holder pertaining to the exercise of rights under Existing Agreements.

(b) Disturbance of Resources

- **Purpose.** The purpose of this section is to describe those activities that are consistent with the Conservation Objectives.
- **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 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 the Holder wants to condition other activities on “subject to Review”.
- **Other Resource Management Activities.** The last category of “other resource management activities in accordance with a Resource Management Plan” is not only subject to Review but is subject to the discretion of the Holder. The reason is that some resource management activities might not be appropriate

anywhere in the Riparian Buffer even if performed in accordance with a Resource Management Plan. The last category is also intended as a kind of safety valve to provide latitude for changes in resource management practices over time; for example, changes that may become necessary or desirable due to climate change.

- **Extraction of Oil and Natural Gas.** Subsurface oil and natural gas lying beneath the Riparian Buffer are natural resources that, unless disturbance is specifically permitted, may not be extracted. The rationale for permitting wholly subsurface extraction within the Riparian Buffer under §4.03(b)(vii) of the model is discussed in commentary §3.03(b).
- (c) **Recreational and Educational 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 a separate legal instrument or by adding a section to Article V granting public access. *See* commentary to Article V.
 - 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 V. Rights and Duties of the Holder and Beneficiaries

- **Purposes.** The purposes of Article V are first, to grant to the Holder the right to enforce the restrictive covenants imposed by the undersigned Owners in perpetuity and second, to explain the relationships between the Holder and Owners and the Holder and Beneficiaries (if any).

5.01 Grant to the Holder

(a) **Grant**

- **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 and Perpetual.** The grant to the Holder must be both unconditional and perpetual to qualify as a charitable deduction under §1.170A-14(b)(2) of the Regulations. 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.
- **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 Grant but the grant is complete once the document is signed and unconditionally delivered. Standard 9. Practice I. of S&P requires that all land and easement transactions are legally recorded at the appropriate records office according to local and state law.
- **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.** The Grant operates to vest the Conservation Easement in Holder. The Conservation Easement is a kind of servitude -- a real estate interest that establishes a long-term, land-based, stable arrangement that, as the name suggest, serves a particular purpose. The particular purposes of the Conservation Easement may 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. To achieve the goal of establishing long-term, reliable, land-use arrangements,

servitudes are binding upon future Owners of the Property whether they agree to the arrangement or not. Unlike contracts, Owners cannot terminate their obligations under a servitude, such as a Conservation Easement, by paying compensatory damages.

(b) Superior to all Liens

- **Subordination of Liens.** Subordination of any Lien affecting the Property as of the Easement Date is required for compliance with the Code and Regulations but, even if no charitable contribution is being claimed, Holder would want assurance that the Conservation Easement could not be extinguished by foreclosure of a Lien prior in right to the Conservation Easement. This would certainly be true in the case of a purchased Conservation Easement; the Holder would want the purchase price applied first to satisfy outstanding Liens.
- **S&P.** Standard 9 Practice H of S&P provides that mortgages, liens and other encumbrances that could result in extinguishment of the easement or significantly undermine the important conservation values of the property must be discharged or properly subordinated to the easement.
- **Code Requirement.** A Qualified Conservation Contribution must be enforceable in perpetuity under §170(h)(5)(A) of the Code. Under Regulation §1.170A-14(g)(2) this requirement is satisfied in the case of mortgaged property (with respect to which the mortgagee has not subordinated its rights) only if the donor can demonstrate that the conservation purpose is protected in perpetuity without subordination of the mortgagee's rights.
- **Time.** Owners should be advised of this requirement early in the process. Satisfaction of this requirement frequently requires substantial time and effort.
- **ConservationTools.org.** The guide [Mortgage Subordination](#) and accompanying [Model Mortgage Subordination and Commentary](#) offer advice on how to approach mortgage lenders and mortgage servicing companies to obtain subordination; a discussion of recent Tax Court opinions on the issue; and a model document keyed to address those issues.
- **Acceptance of Lien.** A Holder could exercise its business judgment to accept a Conservation Easement under and subject to an outstanding Lien provided that no tax benefit was being sought. Some of the factors influencing the decision to take that risk would be: the relative value of the Lien to the value of the Property; the creditworthiness of the Owners; and the financial resources of the Holder if, in a worst case scenario, Holder had to purchase the outstanding Lien so as to prevent extinguishment of the Conservation Easement upon foreclosure.

5.02 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 below. 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 (§5.03) lists rights that the Holder may but is not obligated to perform.
- **Rights but No Duty.** Occasionally, a Grant may be prepared outside of a governmental program, charitable donation under the Code, or other circumstance that requires or makes it desirable for the Holder to accept a duty to enforce the terms of the Grant. For example, the Holder could be a downstream neighbor who wants to see the Waterway protected. In that case, §5.02 and §5.03 can be merged into a single section vesting the right, *but not the duty*, to enforce the terms of the Grant. The downstream neighbor, if not qualified to be a "holder", under the Conservation and Preservation Easements Act, nevertheless has common law rights to enforce a servitude -- particularly when the benefited land adjoins the burdened land.
- **S&P.** Standard 2 Practice F. of LTA Standards requires that each Conservation Easement accepted by a land trust be reviewed and approved by the board of the land trust with timely and adequate information prior to final approval.

(a) Enforcement

- **Regulations.** The right of enforcement is both a right and a duty under Regulation §1.170A-14(g)(5)(D)(ii). The Holder must have a right to enforce the conservation restrictions by appropriate legal

proceedings including, but not limited, to the right to require the restoration of the Property to its condition as of the Easement Date.

- **S&P.** Standard 6. Practice G. of S&P requires the land trust to have a secure and lasting source of dedicated funds sufficient to cover the costs of stewarding its land and easements over the long term and enforcing its easements. Standard 11 Practice A. provides that the land trust must determine the long-term stewardship and enforcement expenses of each easement transaction and secures the dedicated or operating funds to cover current and future expenses. If funds are not secured at or before the completion of the transaction, the land trust has a plan to secure those funds and has a policy committing the funds to this purpose. Standard 11. Practice E. requires the land trust to have a written policy and/or procedure detailing how it will respond to a potential violation of a conservation easement, including the role of all parties involved (such as board members, volunteers, staff and partners) in any enforcement action. The land trust takes necessary and consistent steps to see that violations are resolved and has available, or has a strategy to secure, the financial and legal resources for enforcement and defense.
- **Prior Notice.** Notice to Owners is not required prior to entry under §5.02(a) to investigate a suspected, alleged or threatened violation. Prior notice is required prior to routine inspections under §5.02(b).

(b) Inspection

- **Regulations.** Regulation §1.170A-14(g)(5)(ii) requires the Holder to have the right to enter the Property at reasonable times for the purpose of inspecting the Property to determine if there is compliance with the terms of the donation.
- **S&P.** Standard 11 Practice C. of S&P requires the land trust to monitor its easement properties regularly, at least annually, in a manner appropriate to the size and restrictions of each property and keeps documentation (such as reports, updated photographs and maps) of each monitoring activity. Inspection is also required prior to acceptance of a conservation easement under Standard 8. Practice E. of S&P.

(c) Review

- **Regulations.** Regulation §1.170A-14(g)(5)(ii) requires Owners to *notify* the Holder prior to the exercise of any reserved right, e.g., the right to extract certain minerals, which may have an adverse impact on the conservation interests associated with the qualified real property interest.
- **Protection of Resources.** Many reserved rights of Owners must be conditioned upon Holder review and approval to ensure that actions impacting the Riparian Buffer are consistent with the Conservation Objectives.
- **S&P.** Standard 11. Practice F. of S&P provides that the land trust must have an established procedure for responding to landowner required notices or requests for approvals in a timely and consistent manner, and has a system to track notices, approvals and the exercise of any significant reserved or permitted rights.

(d) Interpretation

- **Regulations.** This duty is not specifically required under the Regulations; however, most Holders perform these tasks in the ordinary course of administration of a conservation easement.
- **S&P.** Standard 11 Practice D of S&P requires the land trust to maintain regular contact with owners of easement properties. When possible, the land trust should provide landowners with information on property management and/or referrals to resource managers. The land trust strives to promptly build a positive working relationship with new owners of easement property and informs them about the easement's existence and restrictions and the land trust's stewardship policies and procedures.

5.03 Other Rights of the 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.** PALTA urges Holders to formulate and adopt a policy on Amendment. PALTA intends to collect and publish examples of [Amendment policies](#) adopted by Holders in Pennsylvania. The model does not write into the Grant the policy of the Holder as of the Easement Date; instead, the approach taken is to identify the elements of an Amendment policy that must always apply (consistent with Conservation Objectives; no private benefit under the Code) but leave the issue of conformance to Holder's policy as it exists when the issue arises; i.e., if an Amendment is sought in the year 2020, it is Holder's policy at that time that will apply. For an explanation of private benefit rules, refer to §501(c)(3) of the Code and associated Regulations. The Land Trust Alliance published the report [Amending Conservation Easements](#) in 2007 with recommendations pertaining to Amendments. The report recommends seven principles to guide Amendment policies: "An amendment must:
 1. Clearly serve the public interest and be consistent with the organization's mission.
 2. Comply with all federal and state law.
 3. Not jeopardize the land trust's tax-exempt status or status as a charitable organization under federal or state law.
 4. Not result in private inurement or confer impermissible private benefit.
 5. Be consistent with the conservation purpose(s) and intent of the easement.
 6. Be consistent with the documented intent of the donor, grantor and any direct funding source.
 7. Have a net beneficial or neutral effect on the relevant conservation values protected by the easement."
- **S&P.** Standard 11 Practice I. of S&P provides that the land trust has a written policy or procedure guiding amendment requests that: includes a prohibition against private inurement and impermissible private benefit; requires compliance with the land trust's conflict of interest policy; requires compliance with any funding requirements; addresses the role of the board; and contains a requirement that all amendments result in either a positive or not less than neutral conservation outcome and are consistent with the organization's mission.

(b) Signs

- **Public Access.** Rights to install signage may need to be expanded if the Holder or Beneficiaries need to install Regulatory Signs in connection with Public Trail use.
- **Project Identification.** Installing signage may benefit the Holder in several ways. First, signs bring to the attention of the public the benefits of land conservation. 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 Grant.

(c) Proceedings

- **Purpose.** To put Holder in a position to take legal action under certain circumstances.
- **Protection of Resources.** A 2011 case ([Historic Green Springs v. Louisa County Water Authority](#), United States District Court for the Western District of Virginia) underscored the desirability of providing by agreement (rather than litigation) the right of Holder to take action under Applicable Law to protect natural resources. That case established the right of the easement holder to take action under the Clean Water Act to prevent polluting discharges upstream from the conserved property. Rather than litigate this point under the numerous federal and state statutes that may apply, the model explicitly provides this right to Holder.
- **Administrative Actions.** The Pennsylvania Municipalities Planning Code does not explicitly confer standing on the Holder as an "aggrieved person" -- a status that is necessary to be heard at a municipal hearing on a zoning, subdivision or land development and to appeal an adverse decision. While the municipality will not be bound by the understanding that Holder has these rights in (c)(ii), the Owners may be precluded from silencing the Holder at a municipal hearing. Another useful purpose of (c)(ii) is to provide Holder a basis on which to assert its right to be heard in (and appeal from) an administrative proceeding pertaining to the location of utility improvements to be installed on land to be taken by condemnation.

ADDITIONAL SUBSECTION, IF APPLICABLE:**(d) Resource Management Activities**

To enter the Riparian Buffer to observe various species and habitats and to perform resource management activities in furtherance of Conservation Objectives. Resource management activities, other than cutting and removal of Invasive Species by mechanical means, are to be performed in accordance with a Resource Management Plan submitted to Owners for review and approval, not to be unreasonably withheld or delayed.

- **Purpose.** Some Holders want the opportunity to further Conservation Objectives by furnishing the Holder's own labor and materials for projects involving properties on which the Holder holds a conservation easement. An example might be a stream restoration project. The model provision requires Owners' approval for most projects in deference to the Owners' understandable desire to participate in decisions that might significantly alter landscapes or involve safety risks. Cutting back or digging out Invasive Species was considered a fairly low-impact activity that the Holder might engage in without Owners' prior approval.

5.04 Review

- **Purpose.** The purpose of this section is to provide the procedure for Review as and when Review is required under Articles II, III and IV.

(a) Notice to the Holder

- This provision contains the procedural requirements to initiate the Review process.
- Some Holders may want a longer period of Review. If one or more of the Beneficiaries has a right to participate in the Review, the number of days in this provision for the Holder to respond should be somewhat longer than the period Beneficiary is given to Review under this Article.
- 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 Grant. 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 Grant 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 Review

- The approach taken by the model is to allow for the possibility of wholly discretionary Review in those instances in which the activity, use or Improvement would otherwise not be permitted at all. Subsection (d)(i) makes it clear that the phrase "which Holder, without any obligation to do so" in relation to an approval or determination means that Holder is not obliged to give its reasons for accepting or declining a

proposal by Owners in that particular instance. The phrase is only used a few times in the model: 3.03(c)(viii) pertaining to storage tanks and Utility Improvements servicing locations outside the Property; 4.03(d) pertaining to vehicular use in Highest Protection Area; 4.04(b)(iv) pertaining to conversion of Woodland Areas into Agricultural use; 7.06 pertaining to issuance of a Waiver. Users may, of course, use the phrase more or less frequently as desired.

- Except for those instances in which Review is wholly discretionary on the part of Holder, the general rule provided in the model is that Holder must act reasonably in discharging its duty to Review. The rationale for including in the model a standard of reasonableness based upon ecological concerns as set forth in subsection (d)(ii) is to avoid the possibility that a court might imply a standard of commercial reasonableness if no other standard has been agreed upon by the parties.
- Some users may want to substitute for both subsections (i) and (ii) the general principle that Holder need not be reasonable in making its decision -- a “sole and arbitrary” standard. The risk of adopting that standard as a stand-alone proposition (without the reasonableness standard of subsection (ii) as a backup) is that the standard might not hold up if tested in litigation. Parties to contractual arrangements have an implied duty of good faith and fair dealing which requires them to act reasonably towards each other. If the “sole and arbitrary” standard is stricken, then there is no standard at all and a standard of commercial reasonableness may be inferred to fill the void. Nevertheless, the following provision can be substituted for subsections (i) and (ii) of 5.04(d):

Holder’s approval may be given or withheld in Holder’s sole and arbitrary discretion. Holder may, but is not required to, furnish Owners with the reasons for Holder’s decision.

ADDITIONAL SUBSECTION, IF APPLICABLE:

(e) Dispute Resolution

- **Notice of Dispute.** If Owners disagree with Holder’s determination under §5.04 their only recourse under the model is to litigate the reasonableness of Holder’s decision under the standards set forth in subsection (d). If Owners and Holder desire to include an alternative means to resolve the dispute, an additional subsection (e) can be added that will provide in clause (e)(i) a notice provision to start the alternative dispute resolution procedure and, thereafter, provisions for mediation or arbitration or both. The examples set forth below are only intended to provide the basic terms of alternative dispute resolution. Counsel for Holders may desire to use more extensive provisions. For more information, see the [American Arbitration Association’s website](#). (Mediators and arbitrators have opportunity to provide contact information and references in the [Experts](#) directory at [ConservationTools.org](#).)
- (i) Holder’s decision under §5.04(b) is final unless, within ten (10) days after receipt of Holder’s notice, Owners deliver to Holder a notice (“Owners’ Dispute Notice”) that Owners dispute the reasonableness of Holder’s decision under the standards set forth in §5.04(d) and the reasons for such determination. If Owners and Holder do not otherwise resolve the dispute within ten (10) days following Owners’ Dispute Notice, the dispute is to be referred for alternative dispute resolution as provided below.
- **Mediation.** Mediation, whether or not required under the document, can be a valuable tool to assist Owners and Holder in finding a way to resolve a disagreement as to whether the proposal that is subject to Review adversely affects natural resources or is inconsistent with Conservation Objectives. The purpose of mediation is to resolve disputes – not to judge whether one side is right and the other is wrong. If the mediation is not successful, Owners can proceed to litigate the dispute or, if desired or required by the terms of the Grant, can seek arbitration of the dispute (see below). Because mediators do not act as judges or final arbiters of the dispute, it is inappropriate to draft a mediation provision that calls for the mediator to issue a decision if the mediation is unsuccessful.
- (ii) If Owners and Holder do not otherwise resolve the dispute within ten (10) days following Owners’ Dispute Notice, the dispute is to be referred to a mediator mutually agreeable to Owners and Holder. If, within thirty (30) days following Owners’ Dispute Notice, Owners and Holder are unable to agree upon a person to serve as mediator, the Pennsylvania Land Trust Association is authorized to appoint the mediator at the request of either Owners or Holder. The person appointed as mediator must, unless otherwise agreed by Owners and Holder, be an appropriately certified or trained mediator. The mediator may engage a forester,

agronomist or other conservation or resource management professional to assist in finding a resolution of the issue that both meets the requirements for approval of a proposal subject to Review and is acceptable to Owners and Holder. Both the mediator and any resource management professional engaged by the mediator must be independent and unaffiliated with either Owners or Holder. The costs of mediation are to be borne equally (one-half each) by Owners and Holder. Both Owners and Holder must exercise good faith, reasonable efforts to resolve the dispute; however, if, within sixty (60) days following Owners' Dispute Notice, a mutually binding resolution of the dispute has not been achieved, neither Owners nor Holder are obliged to continue mediation.

- **Final Disposition.** Mediation never guarantees a final result. A provision in a conservation easement document that purports to require the mediator to issue its decision at the end of an unsuccessful mediation is not enforceable against the mediator and changes the role of the mediator to that of judge rather than neutral facilitator. If Owners or Holder are determined to have a final disposition to the Review process without litigating in court, they must provide for binding arbitration without right of appeal. Provisions for binding arbitration must be carefully drafted so as to be enforceable. A discussion of the requirements for drafting effective arbitration clauses is outside the scope of this commentary. One concern, however, that should be noted is whether an agreement to arbitrate would be enforceable against subsequent Owners. In order to be binding, the parties to arbitration must agree to waive their constitutional rights to a judicial resolution of a dispute. The issue is whether acceptance of a deed to a Property under and subject to a document requiring binding arbitration constitutes a knowing and voluntarily waiver of Constitutional rights to jury trial and other due process of law.
 - **Cost and Time.** Arbitration is a more formal procedure than mediation. It is conducted by an arbitrator who basically acts as a judge under rules that are very much like the procedures that would apply to a trial in a court of law. As a result, arbitration may cost as much in time and expense as litigating in court and, at the end, may not result in a final disposition without further resort to judicial process. One type of arbitration, often called baseball arbitration because it is used by major league baseball to resolve contract disputes, is a bit of a gamble but may reduce the cost and time required to reach a final disposition. The procedure encourages both Owners and Holder to discard negotiating positions and, instead, put forth their last best offer. The following is a simple example of a baseball-type arbitration clause.
- (iii) If the mediation under the preceding subsection is unsuccessful, Owners and Holder agree to submit their respective final written proposals to a conservation or resource management professional, unaffiliated with either Owners or Holder, who has the expertise, training or qualifications to conduct a Review of their respective proposals (the "Reviewer") so as to select one, and only one, that meets the standard of reasonableness set forth above. If Owners and Holder are unable to identify a mutually agreeable Reviewer, the Reviewer is to be appointed by the Pennsylvania Land Trust Association. Owners and Holder must each submit one, and not more than one, written proposal to the Reviewer within ten (10) days following appointment of the Reviewer. Within thirty (30) days following receipt of such proposals, the Reviewer must select, by notice to Owners and Holder, either Owners' proposal or Holder's proposal as submitted, without compromise or modification. Neither Owners nor Holder are permitted to communicate with the Reviewer during the Review period. The decision of the Reviewer is final and is conclusively deemed to meet the standards of reasonableness set forth above in this section. Owners and Holder accept this procedure in full satisfaction of any and all rights that they may have under applicable law or otherwise to appeal or otherwise litigate disputes arising with respect to Review under this Grant. The costs of the Reviewer are to be borne equally (one-half each) by Owners and Holder.

5.05 Reimbursement

- The approach taken by the model is to correlate the obligation of Owners to reimburse with the obligations of the Holder to enforce, inspect, Review and interpret under §5.02. Note that expenses under §5.03(a) entitled "Amendment" are not automatically covered. These should be handled as part of the Amendment agreement.
- Some Owners do not want to commit to reimburse expenses without prior notice or approval. The following language can be added to §5.05 to accommodate that concern:

Owners are not responsible to reimburse costs and expenses arising from Holder's response to an inquiry or request by a Person other than Owners without Owners' approval.

ADDITIONAL SECTION, IF APPLICABLE:**5.06 Beneficiaries**

- **Purpose.** The purposes of this section are to describe the relationship between the Holder and one or more Beneficiaries and to specify exactly what rights have been vested in each Beneficiary. Example:

Owners and Holder grant and convey to the Beneficiaries identified below the right to exercise Holder's rights and duties under this Grant should Holder fail to uphold and enforce the terms of this Grant:

- The conservation district of the county in which the Property is located.
- The Commonwealth of Pennsylvania.
- Alternatively, one or more Beneficiaries could be granted additional rights. For example:

The _____ Conservation District has the following rights as Beneficiary of this Grant: (i) the right to exercise Holder's rights and remedies under this Grant should Holder fail to uphold and enforce in perpetuity the restrictions under this Grant; (ii) the right to approve any transfer of Holder's rights under this Grant; and (iii) the right to approve any amendment of this Grant.
- **S&P.** Standard 8. Practice J. of S&P provides that land trusts engaging in a partnership or joint acquisition of a long term stewardship project should document in writing, as appropriate, the goals of the project, roles and responsibilities of each party, legal and financial arrangements, communications to the public and between parties, and public acknowledgment of each partner's role in the project. The provisions of Article V are intended to document the rights of each Beneficiary consistent with Standard 8. Practice J. Other arrangements as between Holder and Beneficiary covering matters described in Standard 8. Practice J. may be documented by grant agreements or other writings separate from the Grant.
- **Reference.** See the commentary to §5.06 of the *Model Grant of Conservation Easement* for other examples of potential Beneficiaries and their rights.

ADDITIONAL SECTION, IF APPLICABLE**5.07 Public Access**

- **Generally Not Required but Sometimes Desirable.** Conservation easement transactions generally do not require public access. However, public agencies sometimes require public access as a condition for financially supporting a conservation project. Also, a grant of public access can be helpful to support Owners' eligibility for a federal tax deduction associated with the charitable donation of a conservation easement (specifically in regard to the public benefit test for qualified conservation contributions).
- **Resources.** Resources are available at ConservationTools.org to help establish and manage public access:
 - **Model Access Easements.** The [Model Grant of Fishing & Boating Access Easement](#), the [Model Trail Easement Agreement](#) and the [Model Grant of Trail Easement](#) may be coupled with a grant of conservation easement to establish public access as part of a conservation project.
 - **Hybrid Easement.** The [Model Fishing Access Agreement and Commentary](#) combines a grant of public access and resource protection in one document. However, if resource protection is a high priority, users may be better served by using the *Model Grant of Conservation Easement* in combination with the [Model Grant of Fishing & Boating Access Easement](#).
 - **Guides.** Among other resources at ConservationTools.org are the guide [Reducing Liability Associated with Public Access](#) and the guide [Trail Easements](#).
- **Adaptable to Provide Access to Organized Groups without Granting Access to the Public.** Owners may want to grant limited access on their land to schools or other organizations for various educational or recreational purposes. The model documents prepared for public access purposes may be adapted to provide this more limited access.
- **Three Alternatives for Establishing Public Access.** Depending on the situation, users may choose from three basic alternatives in providing public access in association with a conservation easement project:

1. Record a separate access agreement;
 2. Record a separate access agreement and use §5.07 to tie it together with the Grant of Conservation Easement; or
 3. Use §5.07 of the Grant of Conservation Easement as the sole means for establishing public access.
- **ALTERNATIVE 1: Record Separate Access Agreement.** Conservation easements and access easements are sufficiently different in character that it generally makes sense to establish them in *two separate legal documents* rather than in a single legal instrument. If a grant of public access is desired as part of the conservation transaction, a document designed for that purpose (an "Access Agreement"), such as one of the model documents identified above, can be signed and recorded immediately after the Grant of Conservation Easement. In that case, there is no need to include in the Grant a provision on public access (such as §5.07) because the understanding of the parties is set forth in the Access Agreement. Among the benefits of this approach:
 - **Avoid Problems.** Using two legal documents avoids the inconsistencies and ambiguities as well as the resulting confusion and conflicts that often arise when combining two very different functions in a single legal instrument. (See the guide [Trail Easements](#) for more information.)
 - **Fully Address Access Issues.** The [Model Trail Easement Agreement](#) and the [Model Grant of Fishing & Boating Access Easement](#) were designed to allow both Owners and Holder the opportunity to address an array of management and administrative issues, as well as liability issues and other concerns of Owners that often arise when members of the public have access to private property.
 - **Flexibility Regarding Holder.** Using two documents allows a project participant other than Holder, perhaps the County Beneficiary or Township Beneficiary, to assume a leadership role in managing and administering the public access – either from the outset or at a later date.
 - **ALTERNATIVE 2: Record Separate Access Agreement and Use §5.07 to Tie Together.** Sometimes it's preferred to strongly and permanently tie the natural resource protection and public access elements of a conservation project together. For example, a public agency helping with the costs of the conservation transaction may want to ensure that the Holder of the Grant of Conservation Easement has a continuing duty to ensure public access (even if the holder of the Access Agreement changes). Another example: Owners may want to bolster their federal tax position that public access was an integral part of a single qualified conservation contribution.
 - §5.07(a), set forth below, can be added to the Grant to evidence that the grant of public access is part of a single, unified, conservation transaction.
 - Some financial supporters of conservation projects may want the Holder's *right* to furnish public access, set forth in §5.07(a), to be accompanied by the *duty* to do so. §5.07(b), set forth below, can be added to the Grant to assure a project funder that any public access required by the funder as a condition of providing funding for the project will in fact be provided in perpetuity.
 - Together, §§5.07(a) and (b), although entirely or in part redundant to the Access Agreement, solidify the power of Beneficiaries to see that public access is provided regardless of anything included in the Access Agreement -- as of the Easement Date or at any time in the future. Because these sections are part of the Grant, they cannot be changed except by Amendment approved in accordance with applicable provisions of the Grant.

SUBSECTION(S) TO ADD TO §5.07 IF ACCESS AGREEMENT WILL ACCOMPANY AND BE TIED TO THE GRANT OF CONSERVATION EASEMENT OR IF THE GRANT OF CONSERVATION EASEMENT WILL BE USED TO ACCOMPLISH BOTH PUBLIC ACCESS AND NATURAL RESOURCE PROTECTION

(a) Grant of Public Access

By signing this Grant, the undersigned Owner or Owners, on behalf of themselves and all subsequent Owners, grant to Holder, in perpetuity, the right to traverse the Property within the area identified as “_____” on the Conservation Plan (the “Easement Area”). The easement granted to Holder in this section includes the right to make the Easement Area available to the general public for purposes [for two

document approach, insert purposes that reflect those described in the Access Agreement; for one document approach, insert “described in §5.07(c)”, and subject to the limitations, set forth [for two document approach, insert “in the Access Agreement described in Article VIII”; for one document approach, insert “below”.

- **Additions to Glossary.** For consistency, add the term “Easement Area” to the Glossary in Article VIII with the following cross-reference: “The term is defined in §5.07.” If applicable, add the term “Access Agreement” to the Glossary. See the commentary to Article VIII for a definition of “Access Agreement.”
- **Alternatives to Delineation on Conservation Plan.** The Easement Area may instead be described in a separate exhibit, in which case substitute the following: ‘traverse the Property within the area identified as “_____” on Exhibit “___” (the “Easement Area”).’ Alternatively, use prose to describe the Easement Area; for example, ‘traverse the Waterway and within eight (8) feet of the Top of the Banks of the Waterway (collectively, the “Easement Area”).’
- **Numbering.** If §5.07(b) is unneeded and there will be a separate Access Agreement, the content of §5.07(a) may be placed directly under the heading for §5.07 and the subsection reference may be eliminated.

(b) Holder’s Obligation

Holder must take such steps as may be reasonably necessary to remove any Improvements and constrain any uses or activities that impair, in any material respect, public access to the Easement Area pursuant to the easement granted in this §5.07. Should Holder fail to do so after notice and a reasonable opportunity to cure, the Beneficiaries may exercise such rights as they may have under this Grant to restore public access to the Easement Area.

- **Obligation to Install Access Improvement.** Some project funders may additionally want to obligate the Holder to build a public trail or other public access improvements. In this case, add the following to the end of the first sentence of §5.07(b): “and install, or cause the installation of, the public trail [or other public access improvements].”
- **End of §5.07 if Grant is Accompanied by an Access Agreement.** If a separate Access Agreement will accompany the Grant, then §5.07 ends here. If not, then §5.07 will continue as described in ALTERNATIVE 3 below.
- **ALTERNATIVE 3: Use §5.07 of the Grant of Conservation Easement as the sole means for establishing public access.** If Owners, Holder, or Beneficiaries do not want to record a separate Access Agreement to address issues that arise when public access to private property is granted, then add the definition of “Public Trail” furnished in Article VIII of this commentary to the Grant and the following provisions, tailoring as needed per the footnotes:

ADDITIONAL SUBSECTIONS TO ADD TO §5.07 IF SINGLE DOCUMENT APPROACH IS CHOSEN, I.E., NO ACCESS AGREEMENT ACCOMPANIES GRANT

(c) Purposes of Easement for Access

The purposes of the easement for access are as follows:

- (i) For public use of the Easement Area for [insert purposes¹]. [Insert limitations; for example: Public access is limited to the hours between dawn and dusk.²]

¹ Examples: “fishing and boating”; or “hiking, nature study and wildlife watching”; or “walking, hiking, jogging, non-motorized cycling and horseback riding on the Public Trail”.

² Another example: “Holder may impose limitations on the time, place and manner of public entry. To the extent required by Applicable Law, neither this section nor any other provision of this Grant prevents use of the Easement Area by power-driven mobility vehicles by Persons with mobility impairments.” Examples of reasonable limitations would be requiring animals to be leashed or restricting audio devices.

- (ii) For the installation and maintenance of [insert facilities; for example, “the Public Trail or “ a boat launch”] and posting of Regulatory Signs with respect to the use of the Easement Area or other information pertaining to the public access granted under this section.³ The rights granted in this subsection (ii) are exercisable only by Holder and Persons designated by Holder to exercise these rights.

- **Addition to Glossary.** If applicable, add the term “Public Trail” to the Glossary in Article VIII. A definition of “Public Trail” is furnished in Article VIII of this commentary.

(d) Rights of Owners

- (i) **Consistent with Public Access.** The easement for access is non-exclusive. Owners may continue to use the Easement Area in accordance with the terms of this Grant so long as Owners’ use is consistent with the rights granted in this section and does not prevent or impair access to the Easement Area for the purposes described above.⁴ Owners may at any time request from Holder clarification of activities and uses that conform to this standard.⁵
- (ii) **Right to Exclude.** Owners retain the right to take any action permitted under Applicable Law to remove from the Property (including the Easement Area) Persons engaged in activities or uses other than those set forth as purposes of the easement for access granted above.⁶

(e) Immunity under Applicable Law

Nothing in this Grant limits the ability of Owners, Holder or any Beneficiary to avail itself of the protections available under any Applicable Law affording immunity to Owners, Holder or any Beneficiary including, to the extent applicable, the Recreational Use of Land and Water Act.⁷

ADDITIONAL OPTIONAL SUBSECTIONS:

(f) 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 Easement Date (a “Public Access Claim”)⁸ is asserted against either Owners or Holder, or both, it is anticipated that they will assert such defenses 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

³ This subsection could be expanded to include rights of Holder to perform resource management activities. See, for example, Article II of the [Model Grant of Fishing & Boating Access Easement](#).

⁴ Some Owners want assurance that they can continue to engage in certain activities that may impact the Easement Area. A provision such as the following can be added: “As of the Easement Date, the undersigned Owner or Owners and Holder have agreed that the following activities engaged in by Owners, their family members or their invitees are consistent with the grant of the easement for access: Sustainable Forestry, recreational hunting and fishing, installation of deer stands and posting of Regulatory Signs (other than signs prohibiting public access to the Public Trail.”

⁵ Some Owners want assurance that Holder will make reasonable accommodations for Owners’ activities in the interest of public safety. A provision such as the following can be added: “Holder will not unreasonably withhold its consent to temporary limitations on public access to accommodate Owners’ right to engage in Sustainable Forestry and hunting activities at times and locations that do not unreasonably interfere with the public benefit intended to be conferred in this Grant.” Sometimes this reserved right is limited to a specific number of days or a specific hunting season by adding the following: “Temporary limitations may not exceed a total of ___ days within any calendar year and, unless otherwise approved by Holder, after Review, are limited to the days set forth in the closure schedule included in the Baseline Documentation.”

⁶ This provision is intended to give Owners’ assurance that they can control (with the assistance of local police, if necessary) undesirable activities such as loitering, picnicking, etc. without the need to list every undesirable activity.

⁷ The Recreational Use of Land and Water Act evidences the public policy of the Commonwealth of Pennsylvania to provide immunity from certain claims to landowners who gratuitously allow their property to be used for recreational purposes by the public.

⁸ For consistency, “Public Access Claim” and “Owner Responsibility Claim” should be added to Article VIII of the Grant with, in each case, a cross-reference to this section as follows: The term is defined in §5.07 of this Grant.

occurring prior to the Easement Date; (ii) Improvements other than those (if any) installed by Holder; or (iii) activities or uses engaged in by Owners, their family members, contractors, agents, employees, tenants and invitees or anyone else entering the Property (including the Easement Area) by, through, or under the express or implied invitation of any of the foregoing.

(g) 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. Owners agree 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.

ADDITIONAL SECTION, IF APPLICABLE:

5.08 Administrative Agent

- **Land Trust as Administrative Agent.** If a land trust has been named as Administrative Agent as described in §1.10 of the commentary, add the following provision to Article V of the Grant:

Owners and Holder acknowledge that the duty of Administrative Agent is to provide inspection, review and interpretation services in the ordinary course; to communicate decisions of Holder with respect to items subject to Review; and to perform such other services as are requested by Holder under the terms of a separate agreement between Holder and Administrative Agent.

Article VI. Violation; Remedies

6.01 Breach of Duty

- **Purpose.** The purpose of this provision is to ensure that the Conservation Easement will be enforceable in perpetuity. This provision, and other limitations on transfer by Holder in §1.06, are required for the Conservation Easement to qualify as a charitable contribution under Regulation §1.170A-14(g)(5)(D)(ii).
- **S&P.** Standard 11. Practice G. of S&P requires the land trust to have a contingency plan for all of its easements in the event the land trust ceases to exist or can no longer steward and administer them. If a backup grantee is listed in the easement, the land trust secures prior consent of the backup grantee to accept the easement. To ensure that a backup or contingency holder will accept an easement the land trust has complete and accurate files and stewardship and enforcement funds available for transfer.

6.02 Violation

- **Purpose.** This section sets forth the procedure for enforcement of the Conservation Easement.
- **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. Restrictions in the Grant have been stated in the passive voice so that the activity itself is the violation regardless of who was the cause of the violation. Tenants, invitees and trespassers can violate the restrictive covenants set forth in the Grant. It is up to Owners to maintain control over the Property. There are several rationales underpinning this approach. First, it avoids the situation in which the Holder must prove not only that a violation occurred but that the Owner (and not anyone else in the universe) caused it. Second, if an activity is not a violation unless Owners caused it, then the Holder has no leverage to cause Owners to restore the damaged resource or keep it from happening again.⁹ To mitigate any overly harsh consequences on an innocent Owner, the model also includes §6.07 captioned “No Fault of Owners”. While that provision does not absolve Owners from restoring the damaged resource, it gives the Owners comfort that they won’t be responsible for costs of Holder in connection with the violation.

⁹ For example, if dumping occurs, it is reasonable to expect that Owners will put a chain across the access point or take similar measures to prevent recurrence.

(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 of the alleged violation. See Article VIII 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, users 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 VII. Consulting or communicating with Owners can be accomplished via a telephone call.

6.03 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.** Holders and their counsel 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, III and IV 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 Person signing the Grant did 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.
- **[ConservationTools.org](#).** The guide [Stewardship Fees](#) explains the legal difficulties that may arise when a conservation easement is used to document Owners’ obligation to make future stewardship contributions to Holder. The [Model Conservation Funding Covenant and Commentary](#) provide an alternative, and more reliable, means to evidence, secure and collect financial obligations from Owners.
- **Arbitration; Mediation.** Provisions for arbitration and/or mediation are sometimes added to grants of conservation easement; 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. Mediation and some types of arbitration provisions may be helpful for the expeditious resolution of a dispute as to whether an Owners’ proposal should have been approved after Review and, to that end, an optional new section pertaining to alternative dispute resolution has been included in §5.04 of the commentary. Holders who want to insert provisions for arbitration or mediation in the general remedies section of the Grant 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 (<http://www.adr.org>). A provision requiring arbitration or mediation must always except the rights of Holder to take immediate action, including petitioning a court for injunctive relief, when imminent harm to Conservation Objectives has occurred or is threatened.

(a) Injunctive 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 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 Grant.

(c) Self-Help

- Many Holders 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.

ADDITIONAL SUBSECTION, IF APPLICABLE:

- **Fine.** Some Holders have expressed a desire to impose a financial penalty to incentivize Owners to bring the Property back into compliance with the Grant sooner rather than later. This device is widely used by community associations to penalize owners who violate restrictive covenants. A remedy in the nature of a financial penalty may also be appropriate for violations that recur sporadically but do not continue for longer than the cure period. For example, Owners allow the Standard Protection Area to be used from time to time for dirt bike racing. By the time the notice and cure provision has run, the activity has ceased only to recur again in a few weeks or months. If desired, the following provision may be added to §6.03:

(d) Fine

Collect a reasonable penalty for each day the violation continues after the expiration of the applicable notice or grace period under §6.02 above (if any) or, in the case of subsequent violations within the same calendar year in which notice and opportunity to cure (if any) under §6.02 has previously been given, for each day the subsequent violation exists whether or not notice of the subsequent violation has then been given or the opportunity to cure has run. [The penalty is \$__ per day subject to adjustment over time to maintain equivalent value with the U.S. dollar as of the Easement Date.]

6.04 Modification or Termination

- **Purpose.** This provision is intended to apply whenever the Conservation Easement is at risk for modification or termination due to a claim of “changed circumstances”, “impossibility” or condemnation (the exercise of the power of eminent domain by a governmental entity).
- **S&P.** Standard 11 Practice J of S&P requires the land trust to understand its rights and obligations under condemnation and the Code and has appropriate documentation of the important conservation values and of the percentage of the full value of the property represented by the easement. The land trust works diligently to prevent a net loss of conservation values. Standard 11 Practice K provides that, in rare cases, it may be necessary to extinguish, or a court may order the extinguishment of an easement in whole or in part. In these cases, the land trust notifies any project partners and works diligently to see that the extinguishment will not result in private inurement or impermissible private benefit and to prevent a net loss of important conservation values or impairment of public confidence in the land trust or in easements.

- **Changed Circumstances.** In regard to claims of “changed circumstances”, the view of legal scholars set forth in §7.11 of Restatement is as follows: A conservation servitude held by a governmental body or a conservation organization may not be modified or terminated because of changes that have taken place since its creation except as follows:
 - If the particular purpose for which the servitude was created becomes impracticable, the servitude may be modified to permit its use for other purposes selected in accordance with the *cy pres* doctrine, except as otherwise provided by the document that created the servitude. When the *cy pres* doctrine is applied, the court will try to find a purpose as near as possible to the particular purpose for which the servitude was created.
 - If the servitude can no longer be used to accomplish any conservation purpose, it may be terminated on payment of appropriate damages and restitution. Restitution may include expenditures made to acquire or improve the servitude and the value of tax and other government benefits received on account of the servitude.
 - If the changed conditions are attributable to the holder of the servient estate [i.e. the Owners], appropriate damages may include the amount necessary to replace the servitude, or the increase in value of the servient estate resulting from the modification or termination.
 - Changes in the value of the servient estate for development purposes are not changed conditions that permit modification or termination of a conservation servitude.
- (a) **Compensatory Damages**
- This provision is intended to be a powerful disincentive to litigation aimed at invalidating a conservation easement. It removes the monetary reward that might otherwise result by successful litigation.
- (b) **Restitution**
- The view of legal scholars is that the remedy of restitution should be available, if desired by the Holder, in the case of violation of a conservation servitude.

ADDITIONAL SUBSECTION, IF APPLICABLE:

- **Conservation Objectives within Property.** Some Owners request Holder to commit its share of the proceeds of a potential taking to projects furthering Conservation Objectives within the remainder of the Property not subject to the taking. For example, if additional road right-of-way is taken, Holder might make available its share of the proceeds to fund planting additional vegetative buffer in furtherance of applicable Conservation Objectives. If that is acceptable to Holder, add the following to §6.04:
- (c) **Application of Proceeds**
- At the request of Owners, Holder will make available its share of the proceeds of a partial taking of the Property (but not other termination or extinguishment) to fund projects that further Conservation Objectives within the remainder of the Property. Holder’s share of the proceeds available for this purpose is net of costs of collection, attorneys’ fees and other expenses for which Holder is entitled to reimbursement under Article V.
- 6.05 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.
- 6.06 No Waiver**
- **Purpose.** The purpose of this provision is to negate the equitable defense of laches. That defense applies when a Person who has a right fails to assert that right and the other Person changes the Person’s position relying on what appears to be acquiescence.

6.07 No Fault of Owner

- **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.

ADDITIONAL SECTION, IF APPLICABLE:**6.08 Multiple Owners**

If more than one Owner owns the portion of the Riparian Buffer in violation of the terms of this Grant, the Owners of the portion in violation are jointly and severally liable for the violation regardless of the form of ownership.

- **Purpose.** This provision means that, if two Owners own the Riparian Buffer, the Holder can collect from either or both of the Owners. A paying Owner can collect from a non-paying Owner under the doctrine of subrogation, but it is not the Holder's problem.

Article VII. 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 Grant.

7.01 Notices

- The purpose of this section is to provide a procedure for the giving of formal notices under the Grant.
- If the user has adopted the defined term "Notice" included in Article VIII of this commentary, §7.01(a) may be deleted.

(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.

7.02 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 apply.

7.03 Binding Agreement

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

7.04 Requirement of Writing

- **Purpose.** This provision has multiple 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 Grant. 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.

- **Amendment.** Ordinarily, an Amendment needs to be approved by the Board or other governance committee that approves acceptance of the Conservation Easement. An Amendment is signed with all of the formalities required of the original Grant and is intended to be recorded in the Public Records. An Amendment permanently changes the terms of the Grant.
- **Waiver.** A party to an agreement can exercise its discretion to waive strict compliance with the terms of the agreement; however, Holders must take care to exercise this discretion only with respect to specific circumstances and for a specific period of time. Oral promises are particularly dangerous because they can be raised later as a defense to Holder's exercise of rights vested by the Grant. The recollection of the Owners may be very different from the Person making the oral commitment on behalf of Holder. The definition of "Waiver" in Article VIII seeks to make clear that a Waiver does not constitute an Amendment because the terms of the Grant remain unchanged. Holder merely waives its right to invoke its remedies under Article VI for a limited period of time. A Waiver must 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. The Board of a land trust should provide direction to the staff as to its authority to grant a Waiver and under what circumstances. Examples of circumstances in which a Waiver might be considered by Holder in its discretion are: unusual weather or unexpected occurrence (drought, fire, earthquake, subsidence, pest invasion); unavailability of a plan, permit or approval for circumstances outside the Owners' control; or a one-day accommodation of an uncommon event such as permitting a tent or parking in a field for a family wedding.

7.05 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.

7.06 Counterparts

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

7.07 Indemnity

- **Purpose.** The Property 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.
- **Environmental Laws.** 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.
- **Liability Coverage.** This provision is intended to place the burden for defense of claims ordinarily covered by homeowners insurance on the Owners and their insurer.
- **Claims Arising from Public Access.** When public access is granted under Article V of the model, Owners often request a clarification as to whether the indemnity in §7.09 requires Owners to indemnify Holder for claims asserted by members of the general public arising from use of the Public Trail or other Easement Area.
 - **Public Access Indemnity.** If Owners are indemnified for Public Access Claims, whether under §5.07 or a separate Access Agreement, add the following clarification to the end of §7.09:
 The indemnity set forth in this section does not obligate Owners to indemnify Holder for Losses or Litigation Expenses arising from Public Access Claims as defined in [§5.07 or, if applicable, the Access Agreement.]

- **No Public Access Indemnity.** If no other indemnity agreement applies, then the following can be added to the end of §7.09 to furnish an appropriate exception for claims covered by the Recreational Use of Land and Water Act:

The indemnity set forth in this section does not obligate Owners to indemnify Holder for claims that are barred by the immunity furnished under the Recreational Use of Land and Water Act”. [Note: for clarity, add the definition of Recreational Use of Land and Water Act with statutory reference as in Article VIII.]

7.08 Guides to Interpretation

- **Purpose.** The provisions of this section are intended to assist future readers of the document to interpret it correctly.
- (a) **Captions**
 - **Purpose.** 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**
 - **Purpose.** These provisions avoid needless repetition of phrases.
 - (c) **Conservation and Preservation Easements Act**
 - **Purpose.** 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 (Third) of the Law of Property: Servitudes**
 - **Purpose.** The purpose of this paragraph is to increase the likelihood that a court interpreting this Grant, should there be any doubt as to the correct interpretation of a provision, will look to the *Restatement (Third) of the Law of Property: Servitudes* as the better view of the law applicable to conservation servitudes.

7.09 Entire Agreement

- **Purpose.** The written text of the Grant 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.
- **Representations in Prior Agreement.** Holder may want to modify this section if there are any representations, warranties or agreements contained in an engagement letter or donation agreement that are intended to survive the grant of the Conservation Easement.

7.10 Incorporation by Reference

- **Purpose.** The provision avoids needless repetition of phrases.

7.11 Coal Rights Notice

- **Purpose.** To satisfy the requirements of §9(d) of the Conservation Easements Act. The notice must be in at least 12-point type and be preceded by the word “Notice” in at least 24-point type.
- **Coal Distribution.** To see a DCNR map of coal distribution in Pennsylvania, click on DCNR website at www.dcnr.state.pa.us, click on GEOLOGY, click on PUBLICATIONS, click on EDUCATIONAL RESOURCES, under the heading “Page-Size Maps” click on Distribution of PA Coals (Map 11).

Article VIII. Glossary

- **Purpose.** 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 Grant. Occasionally, exceptions to this rule are appropriate and, in that case, cross-reference the definition in the Glossary. The phrase “Other Defined Terms” may be substituted for “Glossary”, if desired.
- **Legally Binding.** Definitions of initially capitalized terms are intended to be legally binding on the parties to the document.
- **Commentary.** Article VIII of the commentary includes all of the following:
 - Definitions of initially capitalized terms used in alternative provisions included in the commentary (but not in the model).
 - References to initially capitalized terms used in the *Model Grant of Conservation Easement* or its commentary that are not used in this model but which may be useful. In cases where the referenced terms lack definitions, the definitions may be found in the *Model Grant of Conservation Easement*.
 - Definitions of terms used in the model (but not initially capitalized) are included in the commentary for informational purposes only. These are terms familiar to conservation professionals that may or may not be familiar to Owners or their counsel.
 - Information concerning the definitions of terms used in the model or in alternative provisions included in the commentary. This information is “bulleted” so as to differentiate it from definitions.

8.01 Access Agreement

The document entitled “_____” between the undersigned Owner or Owners and _____, dated the same date as this Grant and intended to be recorded immediately after this Grant

- See §5.07 of the commentary.

8.02 Access Drive(s)

- See §3.02(c) of the *Model Grant of Conservation Easement and Commentary*.

8.03 Additional Improvements

- See commentary to Article III.

8.04 Agricultural Improvements

- See the *Model Grant of Conservation Easement and Commentary*.

8.05 Agricultural

- See the *Model Grant of Conservation Easement and Commentary*.

8.06 Agricultural Management Plan

- See the *Model Grant of Conservation Easement and Commentary*.

8.07 Amendment

- See commentary to §7.04.

8.08 Animal Unit

One thousand pounds (live weight) of any animal.

- This definition is provided to set a standard to determine overgrazing.

8.09 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 Easement Date).

8.10 Best Management Practices

- *See* definition of Resource Management Plan. The phrase can also be used to provide a standard for activities permitted without a Resource Management Plan. *See*, for example, §4.03(b).
- The recommendations of the Natural Resource Conservation Service of the United States Department of Agriculture for key conservation practices are available online at <http://www.nrcs.usda.gov/technical/ECS/agronomy/core4.pdf>.
- The recommendations of the Pennsylvania Department of Environmental Protection for watershed management (including erosion and sedimentation requirements) are available online at:
- <http://164.156.71.80/WXOD.aspx?fs=0442d740780d00008000049b0000049b&ft=1>.
- Forest Stewardship Council principles and criteria are available online at http://www.fscus.org/standards_criteria.
- The Sustainable Forestry Initiative Standard 2005-2009 is available online at <http://www.aboutsfb.org/SFBStandard2005-2009.pdf>.
- The National Standards and Guidelines for the Forest Stewardship Program established by the United States Department of Agriculture (Forest Service) are available online at <http://www.fs.fed.us/spf/coop/library/FSP%20National%20Standards%20&%20Guidelines.pdf>. For implementation of standards and guidelines into a forest management plan, *see* “Planning for Forest Stewardship – a Desk Guide” available online at <http://www.fs.fed.us/spf/coop/library/Forest%20Stewardship%20deskguide.pdf>.
- The American Forest Foundation’s Standards of Sustainability for Forest Certification (2004-2008) are available online at http://65.109.144.60/cms/test/26_34.html.
- Best Management Practices for Pennsylvania Forests, prepared by the Best Management Practices Task Force under the auspices of the Forest Issues Working Group, Shelby E. Chunko, editor, is available online at <http://pubs.cas.psu.edu/FreePubs/pdfs/uh090.pdf>.

8.11 Biological Diversity

Biological diversity (or biodiversity) is the variety of life and its processes, which includes the abundances of living organisms, their genetic diversity and the communities and ecosystems in which they occur. Diversity at all levels from genes to ecosystems need to be maintained to preserve species diversity and essential ecosystem services like climate regulation, nutrient cycling, water production and flood/storm protection.

- The source of this definition is *Conservation Thresholds for Land Use Planners*, Environmental Law Institute, 2003. ISBN #1-58576-085-7 available online at www.elistore.org (hereafter referred to in this commentary as *Conservation Thresholds*.)
- The term is used in the discussion of resource protection objectives for wildlife resources in the model.

8.12 Biological Integrity

Biological (or ecological) integrity refers to a system’s wholeness, including presence of all appropriate elements and occurrences of all processes at appropriate rates, that is able to maintain itself through time.

- The source of this definition is *Conservation Thresholds*.
- The term is used in the discussion of resource protection objectives for Sustainable land uses in the model.

8.13 Buffer

Linear bands of permanent vegetation, preferably consisting of native and locally adapted species, located between aquatic resources and adjacent areas subject to human alteration.

- The source of this definition is *Conservation Thresholds*.

8.14 Barnyard Runoff Controls

The collection and reduction of runoff water and agricultural wastes from barnyards, feedlots and other outdoor livestock concentration areas for storage or treatment to improve water quality.

- The source of this definition is the DEP Manual for Agriculture.
- The phrase is used in the discussion of resource protection objectives for water resources in the model.

8.15 Code

- This definition is intended to incorporate changes in the Internal Revenue Code over time. *See* also Applicable Law above.

8.16 Conservation Easements Act

- *See* commentary to §7.10.

8.17 Commercial Improvement.

An Improvement, other than a Residential Improvement or Agricultural Improvement, that is designed or used for retail, office or other commercial use.

8.18 Conservation Cover

Establishing and maintaining perennial vegetative cover to protect soil and water resources on land retired from agricultural production. This will help reduce soil erosion and sedimentation, thus protecting water quality and creating or enhancing wildlife habitat.

- The source of this definition is the DEP Manual for Agriculture.
- The phrase is used in the discussion of Agricultural uses on Steep Slopes in §4.03 of the model.

8.19 Conservation Cropping Sequence

An adapted sequence of crops designed to provide adequate organic residue for maintenance or improvement of soil tilth. By utilizing this practice one will help improve the physical, chemical and biological soil conditions, maintain or improve soil productivity, protect the soil against erosion and overload runoff and maintain or improve water quality.

- The source of this definition is the DEP Manual for Agriculture.
- The phrase is used in the discussion of Agricultural uses on Steep Slopes in §4.03 of the model.

8.20 Conservation Tillage System

Any tillage and planting system in which at least 30 percent of the soil surface is covered by plant residue after planting to reduce soil erosion by water during the critical erosion period.

- The source of this definition is the DEP Manual for Agriculture.
- The phrase is used in the discussion of Agricultural uses on Steep Slopes in §4.03 of the model.

8.21 Construction

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

8.22 Contour Farming

Farming sloping lands in such a way that tillage, planting and harvest are done on the contour (this includes following established grades of terraces or diversions). This practice may be applied to reduce sheet and rill erosion, to manage runoff, to increase plant available moisture, and to improve surface water quality by reducing siltation.

- The source of this definition is the DEP Manual for Agriculture.
- The phrase is used in the discussion of Agricultural uses on Steep Slopes in §4.03 of the model.

8.23 Cross Slope Farming

Farming sloping land in such a way that tillage, planting and harvesting are done perpendicular to the predominant slope, but not necessarily on the contour. This practice is used to reduce sheet and rill erosion and improve surface water quality by reducing siltation.

- The source of this definition is the DEP Manual for Agriculture.
- The phrase is used in the discussion of Agricultural uses on Steep Slopes in §4.03 of the model.

8.24 Default Rate

- See the *Model Grant of Conservation Easement and Commentary*.

8.25 Dwelling Unit

- See the *Model Grant of Conservation Easement and Commentary*.

8.26 Easement Area

The term “Easement Area” is defined in §5.07.

- This term is added to the Glossary when a grant of public access is to be included as part of the Grant. See §5.07 of the commentary.

8.27 Ecosystem

An ecosystem is a geographic area including all the living organisms (e.g. people, plant, animals and microorganisms), their physical surroundings (e.g. soil, water and air) and the natural cycles (nutrient and hydrologic cycles) that sustain them. Ecosystems can be small (e.g., a single forest stand) or large (e.g. an entire watershed including hundreds of forest stands across many different ownerships).

- The source of the definition is *Conservation Thresholds*.
- The term is used in the discussion of resource protection objectives for Sustainable land uses.

8.28 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, Holders should request a copy of Owners title policy and inquire whether Owners have granted any easements or other servitudes during their period of ownership.

8.29 Existing Improvements

- This definition is sufficient if, in fact, there is an exhaustive list of Existing Improvements included in the Baseline Documentation. It is also acceptable for Holders to list Existing Improvements here assuming the list is relatively short.
- Example: “Existing Improvements as of the Easement Date are as follows: ____.”
- The 6th edition of the model added the phrase “whether temporary or permanent” for emphasis but the defined term in prior versions did not exclude any improvements on any basis including permanency.

8.30 Extraction Improvements

- See the *Model Grant of Conservation Easement and Commentary*.

8.31 Forest

A biological community dominated by trees and other woody vegetation, with a potential mature height greater than 12 feet, having at least 20% closure.

8.32 Forestry

- This definition was selected from many because it included woodland management activities not only for commercial timbering purposes but also for resource protection purposes. See definition of Sustainable when used as a modifier to Forestry.

8.33 Forest Management Plan

[This is a draft definition to encourage discussion. Users are welcome to [suggest improvements](#) to the Pennsylvania Land Trust Association.]

A Resource Management Plan for Forestry operations within the Property (1) that achieves and maintains certification of the Property, or applicable portion of the Property, as a “Well-Managed Forest” by Forest Stewardship Council or other company worldwide accredited to offer landowners independent, third party certification of Sustainable Forest management practices; or (2) otherwise meets the requirements set forth below and such other terms and conditions as are required by Holder as conditions of approval after Review.

- **FSC Standards.** Alternative (1) above eliminates the need for Owners to propose, and Holder to Review, an individualized Forest Management Plan for Property if it has been certified to conform to FSC Standards; for example, forest enrolled in The Nature Conservancy’s “Working Woodlands” program.

(a) Qualified Preparer

The Forest Management Plan (FMP) must be prepared by a qualified forester engaged by Owners. A qualified forester is (1) a Person recognized as a Certified Resource Manager by the Forest Stewardship Council or equivalent certification standard; or (2) a professional forester with a minimum of three years experience managing woodlands who has furnished to Holder satisfactory credentials, at a minimum, evidence of a Bachelor of Science degree in forestry from an educational institution with a forestry curriculum accredited by the Society of American Foresters or other comparable educational standards and two letters of recommendation from similarly qualified professionals.

(b) Plan Requirements

The FMP must be designed to achieve Conservation Objectives pertaining to forest and woodland resources including the following:

- (i) A description of and an appropriately scaled and accurate map identifying the natural and physical features of the Property to include property boundary lines; forest type, stocking, age and stand history; wetlands and water bodies, including rivers, streams, ponds, and lakes both intermittent and year-round; roads, trails or other non-forested areas; special plant and wildlife habitats, including rare or endangered plant or wildlife species or communities to the extent identified by the Pennsylvania Department of Conservation and Natural Resources.
- (ii) An access plan indicating principal routes of ingress and egress for all areas in which forest management is to be conducted including roads, trails and log landing areas, which minimizes new forest openings. Access roads must not exceed twenty (20) feet in width.
- (iii) Management of forest stands for long (i.e. ___ years or more) rotations.
- (iv) Implementation of Best Management Practices for the conduct of forest management and harvesting activities including the establishment, maintenance and reclamation of log landings and skid roads.
- (v) Creation of a balance of forest age classes and diversity of Native Species composition within the Property; i.e., no plantation forestry (a forest stand raised artificially, either by sowing or planting, except planting or

replanting with a diversity of Native Species) nor any liquidation or clear cutting (except to remove diseased or damaged trees for replanting with a diversity of Native Species).¹⁰

- (vi) Measures to minimize erosion and conserve productive soils for Sustainable uses including erosion control measures to be employed during, and at the completion, of each forest management activity to ensure soil stabilization and to prevent erosion and sediment run off adjacent to wetlands and water bodies.
- (vii) Measures to maintain and enhance the quality of forest and timber resources on the Property.
- (viii) Measures to protect the quantity and quality of water resources including the type, amount and location of herbicides, pesticides, fungicides, insecticides, rodenticides and fertilizers to be used, if any.
- (ix) Measures to preserve canopy where identified as contributing to scenic or wildlife habitat resources described in Conservation Objectives.
- (x) Measures to minimize adverse effects upon, and to protect and enhance, habitats for Native Species of plants and wildlife.
- (xi) Prohibition of Forestry activities except in accordance with the FMP.
- (xii) Requirement for on-site, active supervision of all harvesting activities by qualified forester with reporting requirements to Holder of any non-conformity with FMP.
- (xiii) Requirement of completion of harvesting activities within one-year following date of FMP or such longer period as is approved by Holder after Review¹¹.

8.34 Fragmentation

The breaking up of a previously continuous habitat into spatially separated and smaller parcels. Fragmentation results from human land use associated with forestry, agriculture and settlement but can also be caused by natural disturbances like wildfire, wind or flooding. Suburban and rural development commonly change patterns of habitat fragmentation of natural forests, grasslands, wetlands and coastal areas as a result of adding fences, roads, houses, landscaping and other development activities.

- The source of this definition is *Conservation Thresholds*.
- The term is used in the discussion of resource protection objectives for wildlife resources in the model.

8.35 Habitable Improvements

Any dwelling, guesthouse, tenant house, dormitory, clubhouse, bunkhouse or other Improvement containing an apartment or other sleeping accommodations for human habitation.

- This definition is provided to regulate the number of buildings that can be used for one or more Dwelling Units. This definition is particularly useful in cases such as clubhouses, bunkhouses, bed-and-breakfast establishments or quarters for employees where the number of Dwelling Units is less important than the size of the Improvements used for these purposes.

¹⁰ This provision may or may not be appropriate depending upon prioritizing Conservation Objectives. Sometimes clear cutting of one area is preferable to disturbance of a number of areas by selective cutting. Factors that may influence Holder's determination of which method may be appropriate are (1) the importance of maintaining canopy as a Conservation Objective - whether for scenic view or maintenance of a relatively natural habitat; (2) whether "clear cutting" can be done at a time of year, for example, winter, that does not materially impair Conservation Objectives pertaining to natural habitat and ample habitat remains in the vicinity for repopulation; and (3) whether the area being clear cut can and will be reforested with a diversity of Native species in furtherance of Conservation Objectives.

¹¹ A forest management plan is intended to have a long life -- typically a decade or more. However, Owners may propose a Forest Management Plan to accommodate a single harvest. In that case, Holder may want to put a time frame on its completion as an "unusual" event.

8.36 Habitat

The physical features (e.g. topography, geology, stream flow) and biological characteristics (e.g. vegetation cover and other species) needed to provide food, shelter and reproductive needs of animal or plant species.

- The source of this definition is *Conservation Thresholds*.

8.37 Height

- See the *Model Grant of Conservation Easement and Commentary*.

8.38 Hoop House

- See the *Model Grant of Conservation Easement and Commentary*.

8.39 Impervious Coverage

- See the *Model Grant of Conservation Easement and Commentary*.

8.40 Improvement

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

8.41 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 land trusts consult with their insurance carriers to evaluate their coverage under this indemnity.

8.42 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 read select species profiles 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.

8.43 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 Easement Date.

8.44 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(1) (hereafter referred to in this commentary as *Negotiating Boilerplate*).

8.45 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*.

8.46 Lot

- See the *Model Grant of Conservation Easement and Commentary*.

8.47 Market Value

- This term is used as measure of the Holder's Losses under §6.04.

8.48 Mature Trees

Trees having a diameter of ___ inches or more at a Height of five (5) feet from ground level.

8.49 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.

8.50 Notice

A formal notification under this Grant in writing and delivered by one the following methods of delivery: (i) personal delivery; (ii) certified mail, return receipt requested and postage prepaid; or (iii) nationally recognized overnight courier, with all fees prepaid.

- **Purpose.** Use of a defined term for "Notice" is intended to increase awareness that definitional requirements must be met for a communication to be recognized as "Notice" for purposes of the Grant.
- **Capitalizing and Rephrasing.** Users must carefully review the Grant and initially capitalize the term as needed. Rephrasing may be necessary; for example, changing "notify" to "furnish Notice of".
- **Communications.** To maintain the difference between formal Notice and other communications, either party should let the other know when it rejects a communication that it has, in fact, received for failure to comply with Notice requirements. Otherwise, the argument will be asserted that a course of conduct has developed in which formal requirements of notice have been ignored and, thus, are of no further force and effect.

8.51 Owner Responsibility Claim

- The phrase "Owner Responsibility Claim" is defined in §5.07.

8.52 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.

8.53 Owners' Dispute Notice

- The phrase "Owners' Dispute Notice" is defined in §5.04(e)(i).

8.54 Patch

A patch is a relatively homogeneous type of habitat that is spatially separated from other similar habitat and differs from its surroundings.

- The source of the definition is *Conservation Thresholds*.
- The term is used in the discussion of resource protection objectives for wildlife resources in the model.

8.55 Person

- The definition avoids the need for repetitious phrases.

8.56 Preferential Tax Program

Any program under Applicable Law that, as of the applicable date of reference, provides preferential tax treatment for farmland, forestland, open space or other property under conservation easement. As of the Easement Date, examples of Preferential Tax Programs are Act 153 of 1995, Act 319 (sometimes referred to as “Clean and Green”) (72 Pa. Stat. 5490.1 et seq.) and Act 515 (16 Pa. Stat. 11941), and the Preserved Farmland Tax Stabilization Act of 1994, P.L. 605, No. 91.

- This definition is provided for use in connection with Subdivision requirements (*see* commentary to §2.03). The definition may also be used when a Township is named as a Beneficiary (*see* commentary to §1.07). The definition includes future programs that may provide a tax benefit for conservation or resources or preserving open space or making land available to the public for recreational use.

8.57 Proportionate Value

- This definition conforms to the requirements of the Code.
- The Regulations permit valuation of the Conservation Easement using a before-and-after approach; i.e., by comparing the value of the Property immediately prior to the Easement Date with the value of the Property immediately following the Easement Date. The diminution in value attributable to the restrictions in the Grant constitutes Market Value for these purposes.

8.58 Public Access Claim

- The phrase “Public Access Claim” is defined in §5.07.

8.59 Public Trail

A trail for use by the general public to be established within the Easement Area.

- This definition is provided for use when a “Grant of Public Access” is included in Article V and the access includes a trail. *See* also commentary to §3.02(c). The rules applicable to the Public Trail may need to be differentiated from the rules otherwise applicable to trails in general.

8.60 Qualified Organization

- This is the definition provided in the Code.

8.61 Recreational Use of Land and Water Act

The Recreational Use of Land and Water Act, Act of February 2, 1966, P.L. (1965) 1860, No. 586, as amended, 68 P.S. §477-1 *et seq.*, as may be amended from time to time.

8.62 Regulations

- The definition includes future changes to the regulations.

8.63 Regulatory Signs

- These are intended to be the typical no trespassing and no hunting signs but also include signage to indicate trails and interpret resources along trails.

8.64 Residential Improvements

- *See the Model Grant of Conservation Easement and Commentary.*

8.65 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, to the extent consistent with Conservation Objectives, the Owners' desires so long as the methodology complies with Best Management Practices.

- Agricultural Management Plans and Forest Management Plans are types of Resource Management Plans. Users who have included either or both definitions in a grant of conservation easement may want to clarify the term "Resource Management Plan" by adding: The term "Resource Management Plan" includes any Agricultural Management Plan or Forestry Management Plan as those terms are defined in this Article.

8.66 Review

- *See* commentary to Article V.

8.67 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.

8.68 Site Improvements

- *See the Model Grant of Conservation Easement and Commentary* for definition and use of this term.

8.69 Soil Conservation Plan

- *See the Model Grant of Conservation Easement and Commentary.*

8.70 Specimen Tree

An unusually large or well-shaped tree that is worthy of special consideration and has been identified as a "Specimen Tree" on the Conservation Plan.

- This definition is provided for use when a higher standard of care is to be applied under Article IV to activities affecting certain trees.

8.71 Steep Slope Areas

- *See the Model Grant of Conservation Easement and Commentary.*

8.72 Subdivision

- *See* commentary to Article II.

8.73 Surface Use Agreement

[This is a draft definition to encourage discussion. Users are welcome to [suggest improvements](#) to the Pennsylvania Land Trust Association.]

An agreement between Owners and the Person intending to exercise rights to remove or otherwise extract minerals, gas or oil from the Property that sets forth the terms and conditions under which those rights may be exercised. Holder may, at its election, be a party to the Surface Use Agreement or may be named in the Surface Use Agreement as an intended beneficiary with rights to enforce its terms. The following information is required for Review by Holder of any request for approval of extraction activities or Construction of Extraction Improvements and the agreements of the parties with respect to such issues are to be set forth in the Surface Use Agreement:

- Proposed location and maximum area to be disturbed by operations either on a temporary or permanent basis.
- Means of containment and off-site disposal of rock, shale and other spoils
- Measures to prevent erosion or degradation of soils.
- Provision, containment and off-site disposal of water or other compounds in the rock-fracturing process
- Copies of applications for permits and approvals including plans and supporting documentation; other evidence of compliance with Applicable Law. Emergency plan for accidents and releases.

- Safety measures to prevent contamination of water or other resources within the Property or releases of substances regulated under Applicable Law
- Safety measures (such as fencing) to prevent injury to persons or property; insurance certificates; releases and indemnity agreements.
- Schedule of anticipated surface operations (not to exceed one year)
- Restoration plan upon completion of surface operations consistent with Conservation Objectives; schedule for completion of restoration; warranty through two growing seasons.
- Long-term arrangements for maintenance and security of Access Drives.
- Any anticipated non-compliance with Height, Impervious Coverage or other applicable limitations whether temporary, during Construction, or permanent.
- Enforcement rights of Holder with respect to any violations of Surface Use Agreement or other conditions of approval.
- Reimbursement to Holder, either lump sum or by share of royalties, or combination of both, for anticipated costs and expenses of Holder in connection with Review including, if applicable, negotiation and documentation of surface use agreement and additional burdens of oversight and enforcement arising from extraction activities, uses and Construction pertaining to Extraction Improvements.

8.74 Sustainable

- See the *Model Grant of Conservation Easement and Commentary*.

8.75 Utility Improvements

- See the *Model Grant of Conservation Easement and Commentary* for definition and use of this term.

8.76 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.

8.77 Waiver

- See discussion in §7.04 captioned “Requirement of Writing”.

8.78 Wet Areas

- See the *Model Grant of Conservation Easement and Commentary*.

8.79 Woodland Areas

- See the *Model Grant of Conservation Easement and Commentary*.

Closing Matters

- **Closing:** The phrase “INTENDING TO BE LEGALLY BOUND” is especially important where there is no consideration being given for the donation 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.
- **Signature Lines.** Space has been provided for signature by two individual Owners and the conservation organization as Holder. If an Owner is a corporation, partnership or other entity, signature lines similar to those provided for Holder should be substituted. Likewise, a form of acknowledgment similar to that provided for Holder should be substituted for the form provided in the model, which is appropriate only for individual Owners.

- **Joinder/Acceptance.** If a Beneficiary desires to join in the Grant to evidence its acceptance¹² or a County, Township or other Person has agreed to assume rights and obligations pertaining to public access¹³ an additional signature line should be added as follows:

Acceptance by Beneficiary:

[NAME OF BENEFICIARY]

_____ By: _____
 Name:
 Title:

- **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.
- **Acknowledgment.** The date of the acknowledgment should not be earlier than the Easement Date. *See* commentary to opening recitals of Grant.
- **Exhibits.** Check that all Exhibits referenced in the Grant are attached to the Grant before it is signed and recorded in the Public Records.

Exhibit "A"	Legal description of Property
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Other Possible Exhibits:

- Exhibit "___" Conservation Plan
- Exhibit "___" Easement Area
- Exhibit "___" Public Policy Statements
- Exhibit "___" Review Requirements
- Exhibit "___" Mortgage Subordination
- Exhibit "___" County Supplement
- Exhibit "___" Township Supplement

Disclaimer Required by IRS Rules of Practice

Any discussion of tax matters contained in this message is not intended or written to be used and cannot be used for the purpose of avoiding any penalties that may be imposed under Federal tax laws.

¹² See commentary to §1.07 pertaining to "Acceptance".

¹³ See commentary to §5.08 pertaining to "Assignment and Assumption".