

Water Quality Improvement Easement & Commentary

a model document and guidance
for securing long-term access to property
for the purpose of remediating
the effects of abandoned mine drainage

Prepared by the
Pennsylvania Land Trust Association

in cooperation with the
Eastern Pennsylvania Coalition for Abandoned Mine Reclamation
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PA Department of Environmental Protection
Schuylkill Conservation District
Schuylkill Headwaters Association
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and with support from the

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COMMENTARY

to the Water Quality Improvement Easement

Using the Water Quality Improvement Easement

- The model *Water Quality Improvement Easement* 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 abandoned mine drainage remediation project under the guidance of legal counsel. Once a document based on this model has been prepared or reviewed on behalf of the Holder by an attorney licensed to practice law in the Commonwealth of Pennsylvania, the box at the bottom of the signature page that begins “This model should not be construed or relied upon as legal advice...” may be deleted.
- Users of the *Water Quality Improvement Easement* are encouraged to read through the commentary at least once. The commentary follows the same Article and Section structure as the Easement to make cross-referencing easy. To address different situations, the commentary may suggest alternative language to that found in the model or suggest deleting or adding sections. The commentary also explains the purposes behind many provisions.
- **Header:** In the final version of a document prepared using the *Water Quality Improvement Easement* as the base, it is good practice to remove the header “Revised through: [date].” In MS Word, click on *View*, then *Header and Footer*, delete the phrase and close.
- **Recording:** Several county recording offices require at least 3-inches at the top of the initial page for use by the recording office and at least 1-inch margins otherwise. Only 8.5 x 11 inch paper is accepted by many county recording offices. The *Water Quality Improvement Easement* has been formatted to comply with these requirements. Users are urged to consult local recording offices to inquire whether any additional requirements may apply in that county.
- **Updates:** Check www.conserveland.org periodically for updates to the *Water Quality Improvement Easement & Commentary*.

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”.

The Owners

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

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

- All owners as of the Easement Date must join in the Easement to be effective under applicable law.
- The relationship of multiple Owners to each other may be added here but is not necessary for recording or other purposes. Example: X and Y, husband and wife or X and Y, as joint tenants with rights of survivorship.
- If a person other than an individual is granting the 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.
- If only one Owner is signing the Easement, a convenient method to avoid changing plural to singular throughout the document is to substitute the phrase “(whether singular or plural, the “Owners”)” for the phrase “(the “Owners”)”.

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.

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.
- **Articles and Sections.** The model has been structured in Articles and Sections rather than a list of paragraphs. There are several practical reasons for this. One reason is to encourage additional provisions to be clustered with similar provisions instead of adding them to the end where they may be missed in a quick review. Another reason is to avoid wherever possible cross-references to specific paragraphs. A common drafting error is to add or delete paragraphs and not check whether cross-references are still correct. This structure seeks to minimize the opportunities for that error to occur.

1.01 Property

- **Purpose.** The purpose of this Section is to identify the land that will be bound by the terms of the Easement.
 - Street Address: Insert a street address if available; otherwise, try to identify by acreage and frontage along a certain road or roads. Example: 100 acres more or less north side of ___ Road west of the intersection of ___ Road and ___ Road.
 - Municipality: Insert the city, township or borough in which the Property is located. This may or may not be the name of the town used for mailing address purposes.
 - County: Identification of the county is required for recording purposes. If the Property is located in more than one county, it is important to have multiple originals signed so as to permit recording to occur simultaneously in both counties.

Parcel Identifier: The Tax Parcel Identification number for the Property is required for recording in most if not all counties. Some counties also require a Uniform Parcel Identification number. *See* Uniform Parcel Identifier Law (21 Pa. Stat. §§331-337). Some counties charge additional recording fees to note the tax parcel number and/or uniform parcel identifier number on the document presented for recording if not furnished in the document itself or the legal description attached as Exhibit “A”.

1.02 Project

- The purpose of this Section is to incorporate into the Easement a description of the particular water quality improvement project to be undertaken on the Property. The scope of Holder’s rights to enter the Property are as expansive as the definition of the “Project” so this definition should be as broad as possible with the details listed as being “included” in the Project. Care should be taken to include not only a description of the Facilities to be constructed or installed but also site work such as grading or contouring. Also be sure to include monitoring and other activities that may occur from time to time in the future. The term “Facilities” is intended to be expansive and include all buildings, structures and other changes to the Property included in the Project.

1.03 Plan

- The purpose of this Section is to incorporate into the Easement the plan depicting at least one, and up to four, areas that may be subject to easements under this document. The four areas are more fully described below. If the Plan is larger than 8.5 by 11 inches, a reduced copy may be attached to the Easement; however, in that case, it is good practice to identify the Plan specifically. For example:

A reduced copy of the Plan prepared by ___ dated ___ is attached as Exhibit “C”. Holder will keep a full size copy of the Plan on file at the principal office of Holder.

- **Treatment Area.** The area that will always be shown on the Plan is the Treatment Area within which the Project will be pursued over the term of the Easement.
- **Temporary Construction Area.** If a larger area is required during Construction activities for storage of equipment or materials or other staging purposes, the Plan must designate the area to be occupied for that purpose as the Temporary Construction Area.
- **Access Corridor.** If access to the Treatment Area is not available directly from a public right-of-way, the Plan may designate the location of an Access Corridor within which Holder may move personnel and equipment to and from the Treatment Area. In certain Projects, an Access Corridor may only be a path not formally located on the Plan. In that case, §2.01(a) provides for a location to be mutually agreed upon by the Owners and Holder.
- **Utility Corridor.** If the Project requires a source or power or other utility services to service Project Facilities, the Plan must also show the location of a Utility Corridor to be used for these purposes.

1.04 Access Fee

- A section labeled “1.04 Access Fee” is to be added to Article I whenever Owners receive consideration for the grant of the Easement. Language for the section is as follows:

In consideration of the grant of this Easement, Holder is to pay to Owners a fee (the “Access Fee”) in the amount of \$_____.

- Add a sentence describing the terms of payment such as one of these alternatives:
 - The Access Fee is due and payable in full on the Easement Date.
 - The Access Fee is due payable as follows: ___% upon the Easement Date and ___% upon commencement of Construction of the Facilities on the Property.

- [Add to the end of the first sentence: “per year.”] The Access Fee is due and payable in advance on the Easement Date and thereafter on each anniversary of the Easement Date during the term of this Easement.

1.05 Environmental Good Samaritan Act

- If desired, a Section may be added to Article I to make clear that the Owners and/or the Holder are entitled to the limitations of liability afforded to qualified water pollution abatement projects under the Environmental Good Samaritan Act (27 Pa. C.S. §8101 *et seq.*) The purposes of the Environmental Good Samaritan Act are as follows:

[T]o encourage the improvement of land and water adversely affected by mining and oil and gas extraction, to aid in the prevention and abatement of the pollution of rivers and streams, to protect and improve the environmental values of this Commonwealth and to eliminate or abate hazards to health and safety. The purpose of this chapter is to improve water quality and to control and eliminate water pollution resulting from mining or oil or gas extraction or exploration by limiting the liability which could arise as a result of the voluntary reclamation of abandoned lands or the reduction and abatement of water pollution.¹

- For a description of the scope of the immunity available to Owners and Holder, see the Appendix attached to this Commentary.
- The following text may be incorporated into the Easement as §1.05 Environmental Good Samaritan Act, but the immunity provided by the Good Samaritan Act will apply if the requirements for eligibility are met whether or not any provision is included in the Easement:

This Project is intended to meet the requirements for immunity from liability accorded to water pollution abatement projects under the Pennsylvania Environmental Good Samaritan Act (27 Pa.C.S. §8101 *et seq.*) (the “Good Samaritan Act”).

(a) Consideration to Owners

Owners confirm that Owners have not received and will not receive any fee or other consideration for the grant of this Easement or Owners’ participation in the Project.

- If the Owners receive a fee or other consideration for the grant of the Easement, omit §1.05(a). There will be no immunity available for Owners under the Good Samaritan Act. *See* §1.04 of this Commentary for additional section entitled “Access Fee”.

(b) Consideration to Holder

Holder confirms that Holder will provide the equipment, materials and services included in the Project Facilities at no cost to Owners.

- If the Holder receives payment above cost for the Construction of the Facilities, omit §1.05(b). There will be no immunity available to Holder under the Good Samaritan Act.
- If the Holder charges the Owner at cost for the Construction of the Facilities, §1.05(b) set forth above should be modified to substitute “at Holder’s cost” for “at no cost” to Owner. Immunity will still be available to Holder under the Good Samaritan Act.
- If neither Owners nor Holder have rights to immunity under the Good Samaritan Act, delete the entirety of §1.05.

¹ 27 Pa. C.S. §8103

(c) Department Approval

- (i) Holder has submitted to the Pennsylvania Department of Environmental Protection (“PADEP”) a detailed written plan describing the Project which plan has been approved by PADEP as required by §8105 of the Good Samaritan Act.
- (ii) PADEP has given, or will give prior to commencement of the Project, public notice of the Project as required by §8105(b) of the Good Samaritan Act.
- (iii) The Project will be conducted under a general permit issued by PADEP which (i) encompasses all of the activities included in the Project; and (ii) was issued in place of any required stream encroachment, earth disturbance or national pollution discharge elimination system permits.
- The requirements set forth in §1.05(c)(i), (ii) and (iii) must be met for the Project to qualify for immunity under the Good Samaritan Act.

II. GRANT OF EASEMENTS

2.01 Grant of Easement: Treatment Area

- The purpose of this Section is to grant to Holder a permanent easement to enter the Property and exercise exclusive control over the Treatment Area to construct the Facilities and pursue the Project.

(a) Access Corridor

- The purpose of this Section is to grant the necessary rights of ingress and egress to pursue the Project within the Treatment Area. If the Treatment Area can be accessed directly from a public right-of-way, this subsection can be deleted.

(b) Educational Purposes

- The purpose of this Section is to expand access to the Treatment Area to educate the public and allow persons other than Holder to conduct water quality research.

2.02 Grant of Easement: Temporary Construction Area

- The purpose of this Section is to grant a temporary easement over a wider area of the Property during the construction of the Project.
- This Section can be deleted if no Temporary Construction Area is required for the Project.

2.03 Grant of Easement: Utility Corridor

- The purpose of this Section is to provide the right to connect the Treatment Area to sources of power or other utility services within the public right-of-way.
- This Section can be deleted if no Utility Corridor is required for the Project.
- This Section contemplates that the utility facilities servicing the Treatment Area would be connected directly to power sources within the public right-of-way and charges would be billed directly to Holder’s account by the provider of the utility service. If the plan is to connect to existing power sources servicing other improvements on the Property, this Section would need to be expanded to provide for metering of power used by the Project and reimbursement to Owners for the reasonable cost of the power consumed by the Project.

2.04 Term

- There are two purposes for this Section. The first is to confirm that the easement over the Treatment Area continues for as long as Holder desires, even to perpetuity. The second purpose is to confirm that Holder has no obligation to continue the Project in perpetuity and, if the Project is abandoned, the Facilities stay in place unless Owners and Holder have otherwise agreed.

2.05 Beneficiaries

- The purpose of this Section is to identify other agencies (usually funding sources) that may have rights to enter the Property under the authority granted by this Easement. If the rights of a Beneficiary to enter the Property are limited to specific purposes, that limitation can be set forth in this Section. For example, if the Beneficiary is the County and Owners do not want the County to have the right to invite members of the general public onto the Property, add the following to §2.05: “The right of Beneficiary to enter the Property under the authority granted by this Easement is limited to the right of employees of Beneficiary to inspect the Treatment Area and monitor the progress of the Project.” Beneficiaries may, but need not, sign the document to evidence their acceptance of the terms of the Easement.

III. OBLIGATIONS

3.01 No Interference

- The purpose of this Section is to set the general rule that Owners must limit use of the Property (whether by an Owner or other persons, such as a tenant farmer, using the Property) to uses that are consistent with the rights of Holder under this Easement. Specific examples are set forth in (a) and (b) below.

(a) Prohibited Activities

- The list provided in the model is a not intended to be exhaustive – it is only intended to set forth particular examples of possible activities that are likely to interfere with the Project. The model provides for exceptions to these prohibitions on a case by case basis by prior written approval of Holder.
 - (i) Planting or removing vegetation within the Treatment Area.
 - The Treatment Area cannot be used for field crops or other agricultural activities. The success of the Project may be dependent upon maintenance of particular types of vegetation within the Treatment Area.
 - (ii) Construction of any kind within the Treatment Area, Access Corridor, Temporary Construction Area or Utility Corridor, if any.
 - Construction within the easement areas would ordinarily be inconsistent with the exercise of Holder’s rights; however, Owners and Holder may agree on certain exceptions such as fencing with gated access within the Access Corridor or Utility Corridor to permit those areas to be used as pasture. If an exception has been agreed upon prior to the Easement Date, it can be added to this subsection; otherwise, Holder can issue a written approval for the particular item.
 - (iii) Any activity on or about the Property that changes or redirects water resources within or flowing through the Treatment Area such as channelization of a stream or installation or expansion of a well or pond.
 - The success of the Project may be dependent upon the quantity of water passing through the Treatment Area. Activities of the Owners on the remainder of the Property that would interfere with this goal must be prohibited.

(b) Permitted Activities

- There are two purposes to this Section. The first is to describe the kinds of passive activities that may be engaged in by Owners without detriment to the Project. The second is to alert the Owners to the fact that they take the risk of planting crops within an area (such as an Access Corridor) that may be required from time to time for pedestrian or vehicular use in connection with the Project.
- Add additional permitted activities if appropriate.

3.02 Construction

- The purpose of this Section is to give the Owners some protection from the risks of permitting Construction of the Facilities on the Property.

(a) Notice

- The number of days notice can be shortened if desired by Owners and Holder.

(b) Waivers of Liens

- This is an important protection for Owners. Even if the Holder pays the general contractor in full for labor and materials provided to the Project, if the general contractor fails to pay a subcontractor, the interest of the Owners in the Property could still be at risk by the filing of a mechanics' lien.

(c) Insurance

- This provision assures the Owners that if persons entering the Property under the grant of this Easement are injured, insurance coverage will be available to pay those claims.

(d) Permits

- This provision assures the Owners that they will not be exposed to legal liability for violation of zoning, building and safety laws. This provision also places responsibility on the Holder to obtain appropriate permitting from PADEP for the Project including any applicable stream encroachment, earth disturbance or NPDES permits.

(e) Costs

- This provision assures the Owners that providers of labor and materials to the Project will be paid as and when due.

3.03 Indemnity

- This provision assures the Owners that Holder will be responsible to provide defense of certain claims arising from the Project. The first category of claims arise from the violation of the Easement by Holder or a Beneficiary – for example, claims arising from the failure of Holder to obtain proper permits and approvals or the failure of Holder to pay providers of labor and materials. The second category of indemnification arises from claims ordinarily covered by policies of commercial general liability insurance.

3.04 Title

- This provision assures the Holder that there is no holder of a mortgage or other lien who, upon a foreclosure or judicial sale of the Property, could acquire title to the Property free and clear of Holder's rights under this Easement. PALTA intends to make available a form of mortgage subordination that can be used for this purpose if a mortgage exists on the Property as of the Easement Date.

IV. MISCELLANEOUS

- The purpose of this Article is to group together a variety of provisions that either pertain to both Owners and the Holder or that pertain to the administration or interpretation of the Easement.

4.01 Notices

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

(a) Form of Notices

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

(b) Address for Notices

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

4.02 Governing Law

- If one or more of the Owners, present or future, is an out-of-state resident, this provision makes it clear that only the laws of the Commonwealth of Pennsylvania apply. This avoids a dispute about whether the laws of another jurisdiction or the choice of law rules of the Commonwealth of Pennsylvania apply.

4.03 Successors and Assigns

- The purpose of this section is to set forth the rules governing the transferability of rights and duties under the Easement. Some Owners request prior notice and rights of approval as to the identity of the proposed transferee. Rights of prior notice may be given to Owners if the Holder desires to do so. That will give Owners the opportunity to contact the Holder for additional information and, perhaps, suggest other choices without unduly restricting Holder's ability to transfer the Easement should the need arise. If rights of prior notice are given, add the following to the end of §4.03: "Holder must notify Owners within 30-days prior to the assignment of the identity and address for notices of the organization to which Holder intends to transfer its rights under this Easement."

4.04 Severability

- 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 because it is no longer legal or enforceable under applicable law the others remain in full force.

4.05 Counterparts

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

4.06 Guides to Interpretation

- The provisions of this section are intended to assist future readers of the document to interpret it correctly.

(a) Captions

- This provision is self-explanatory; however, drafters need to be aware of the consequences of falling afoul of this provision. The drafter cannot rely on a caption to convey meanings that are not in the text itself.

(b) Other Terms

- These words and phrases are defined so as to avoid repetition in the document.

4.07 Entire Agreement

- The written text of the Easement 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.

4.08 Incorporation by Reference

- The provision serves several purposes (1) it avoids needless repetition of phrases; and (2) it serves as a handy list to check which Exhibits need to be attached to the document.

4.09 Public Records

- This provision reinforces the understanding of the parties that anyone who owns this Property at any time during the term of this Easement is bound by its terms whether or not the owner received a copy of the Easement before acquiring the Property. The fact that it is recorded in the Public Records is sufficient notice of its terms.

Closing

- The phrase “INTENDING TO BE LEGALLY BOUND” is especially important to be added to documents where there is no consideration being given for the grant of the Easement because the phrase is a valid substitute for consideration in the Commonwealth of Pennsylvania.

Witness/Attest

- It is good practice but not necessary for validity or recording to have a document witnessed or, if a corporation, attested by the secretary or assistant secretary.

Signature lines

- Add as many signature lines as are necessary to accommodate the number of Owners who will be signing the Easement. Signatures in black ink are preferred for recording purposes as they are more legible on microfilms.

APPENDIX

to the Commentary to the Water Quality Improvement Easement

- **Owners' Immunity**

If the requirements for eligibility under the Good Samaritan Act are met:

- (1) Owners are immune from liability for any injury or damage suffered by the person implementing the Project while the person is within the Project work area.²
- (2) Owners are immune from liability for any injury to or damage suffered by a third party that arises out of or occurs as a result of an act or omission of a person implementing the Project which occurs during the implementation of the Project.³
- (3) Owners are immune from liability for any injury to or damage suffered by a third party which arises out of or occurs as a result of a Project.⁴
- (4) Owners are not deemed to assume legal responsibility for or incur liability for any pollution resulting from a Project.⁵
- (5) Owners are not subject to a citizen suit filed pursuant to §601 of the Clean Streams Law for pollution resulting from a Project.⁶
- (6) Owners are immune from liability for the operation, maintenance or repair of the Project Facilities constructed or installed during the Project unless an Owner negligently damages or destroys the Project Facilities or denies access to those persons who operate, maintain or repair the Project Facilities.⁷

- **Holder's Immunity**

The Good Samaritan Act provides immunity to any person who provides equipment, materials or services at no cost or at cost for a water pollution abatement project (including Holder) as follows:

- (1) The person is immune from liability for any injury to or damage suffered by a person which arises out of or occurs as a result of the Facilities constructed or installed during the Project.⁸
- (2) The person is immune from liability for any pollution emanating from the Facilities constructed or installed during the Project unless the person [sic] affects an area that is hydrologically connected to the Project work area and causes increased pollution by activities which are unrelated to the implementation of the Project.⁹
- (3) The person is not deemed to assume legal responsibility for or incur liability for the operation, maintenance and repair of the Facilities constructed or installed during the Project.¹⁰

² 27 Pa. C.S. §8106(a)(1)

³ 27 Pa. C.S. §8106(a)(2)

⁴ 27 Pa. C.S. §8106(a)(3)

⁵ 27 Pa. C.S. §8106(a)(4)

⁶ 27 Pa. C.S. §8106(a)(5)

⁷ 27 Pa. C.S. §8106(a)(6)

⁸ 27 Pa. C.S. §8107(a)(1)

⁹ 27 Pa. C.S. §8107(a)(2)

¹⁰ 27 Pa. C.S. §8107(a)(3)

(4) The person is not subject to a citizen suit under §601 of the Clean Streams Law for pollution emanating from the Facilities constructed or installed during the Project.¹¹

- **Exceptions to Owners' Immunity**

No immunity is granted to Owners if Owners charge an access fee or require other consideration before allowing access to the land for the purpose of implementing the Project.¹²

Even if Owners have received no consideration, the scope of Owners' immunity under the Good Samaritan Act *excludes* (and the Owners remain legally responsible for):

- (1) Injury or damage resulting from an Owner's acts or omissions which are reckless or constitute gross negligence or willful misconduct.¹³
- (2) The unlawful activities of an Owner.¹⁴
- (3) Damage to adjacent landowners or downstream riparian landowners which results from the Project where written notice or public notice of the proposed Project was not provided.¹⁵

- **Exceptions to Holder's Immunity**

Persons (including Holder) who provide equipment, materials or services for consideration above cost are not entitled to any immunity under the Good Samaritan Act.¹⁶

The scope of immunity under the Good Samaritan Act for persons who provide equipment, materials or services at no cost or at cost for a Project *excludes* (and the person remains responsible for):

- (1) Injury or damage resulting from the person's acts or omissions which are reckless or constitute gross negligence or willful misconduct.¹⁷
- (2) The unlawful activities of that person.¹⁸
- (3) Damages to adjacent landowners or downstream riparian landowners which result from a Project where written notice or public notice of the proposed Project was not provided.¹⁹

¹¹ 27 Pa. C.S. §8107(a)(4)

¹² 27 Pa. C.S. §8106(c)(2)

¹³ 27 Pa. C.S. §8106(c)(1)

¹⁴ 27 Pa. C.S. §8106(c)(3)

¹⁵ 27 Pa. C.S. §8106(c)(4)

¹⁶ 27 Pa. C.S. §8107(a)

¹⁷ 27 Pa. C.S. §8107(b)(1)(i)

¹⁸ 27 Pa. C.S. §8107(b)(1)(ii)

¹⁹ 27 Pa. C.S. §8107(b)(1)(iii).