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Environmental Quality Board
[submitted via eComment]

Comments regarding:

**Triennial Review of Water Quality Standards (47 Pa.B. 6609)
Consideration for Next Water Quality Standards Review**

The Triennial Review seeks comments regarding whether clarifications should be made regarding how conservation easements should be considered in the evaluation for a stream redesignation. The Pennsylvania Land Trust Association welcomes this opportunity to comment in advance of possible rulemaking on this matter.

The Association believes that, with minimal added complication, the Department can, when conducting redesignation evaluations, account for the positive, perpetual impact that certain classes of conservation easements have on water quality. The Association is willing and able to meet with Department staff if and when appropriate to provide more background on conservation easements, discuss the comments contained here, and further explore options and issues.

The Association urges the Department to factor in the constructive role of conservation easements in safeguarding water quality when conducting redesignation evaluations during the time it is considering possible rulemaking to clarify easement matters.

Introduction

The definition preliminarily suggested by the Department for 25 Pa. Code § 93.1 would effectively eliminate the possibility of conservation easements, whether held by government or land trusts, from factoring into stream redesignations. The Department will find, however, that upon deeper exploration of conservation easement law and practices, it is reasonable for conservation easements to play a greater role in redesignation evaluations. Conservation easements, if held by holders respecting the practices set forth in Land Trust Standards and Practices, drafted with explicit water resource protection objectives, and implemented in accord with a few other Pennsylvania customs, can reliably deliver consistent water quality protections.

The Association's Proposal

The Association suggests that rather than the Department introducing a new definition of conservation easement into Pennsylvania law, that instead a

- Voting Members*
- Allegheny Land Trust
 - Allegheny Valley Conservancy
 - Allegheny Valley Land Trust
 - Allegheny Valley Trails Association
 - Appalachian Trail Conservancy
 - Armstrong County Conservancy Charitable Trust
 - Audubon Society of Western Pennsylvania
 - Bedminster Regional Land Conservancy
 - Berks Nature
 - Brandywine Conservancy
 - The Buck Hill Conservation Foundation
 - Central Pennsylvania Conservancy
 - Centre County Farmland Trust
 - Chestnut Hill Historical Society
 - ClearWater Conservancy
 - The Conservation Fund, Pennsylvania Office
 - Countryside Conservancy
 - Delaware Highlands Conservancy
 - Earth Conservancy
 - East Nantmeal Land Trust
 - Eden Hill Conservancy
 - Edward L. Rose Conservancy
 - Evergreen Conservancy
 - Farm and Natural Land Trust of York County
 - Foundation for Sustainable Forests
 - Fox Chapel Land Conservation Trust
 - French and Pickering Creeks Conservation Trust
 - French Creek Valley Conservancy
 - Hawk Mountain Sanctuary Association
 - Heritage Conservancy
 - Hollow Oak Land Trust
 - Independence Conservancy
 - Lacawac Sanctuary Foundation
 - Lackawanna Valley Conservancy
 - Lancaster County Conservancy
 - Lancaster Farmland Trust
 - The Land Conservancy for Southern Chester County
 - Land Conservancy of Adams County
 - Lebanon Valley Conservancy
 - London Britain Land Trust
 - Lower Merion Conservancy
 - Manada Conservancy
 - Merrill Linn Land & Waterways Conservancy
 - Mid-Atlantic Karst Conservancy
 - Mokoma Conservancy
 - Montour Trail Council
 - Mount Nittany Conservancy
 - Natural Lands Trust
 - The Nature Conservancy
 - Neighborhood Gardens Trust
 - North American Land Trust
 - North Branch Land Trust
 - Northcentral Pennsylvania Conservancy
 - Open Land Conservancy of Chester County
 - Pennsbury Land Trust
 - Pennsylvania Recreation & Park Society
 - Pennypack Ecological Restoration Trust
 - Pine Creek Land Conservation Trust
 - Pine Creek Valley Watershed Association
 - Pocono Heritage Land Trust
 - The Radnor Conservancy
 - Regional Trail Corporation
 - Schuylkill County Conservancy
 - Somerset County Conservancy
 - Susquehanna Greenways Partnership
 - Tinicum Conservancy
 - The Trust for Public Land
 - The Wallace Trust
 - West Pikeland Land Trust
 - Western Pennsylvania Conservancy
 - Westmoreland Conservancy
 - Westmoreland Land Trust
 - Wild Waterways Conservancy Inc.
 - Wildlands Conservancy
 - Willistown Conservation Trust
 - Wissahickon Valley Watershed Association



definition of a “qualified conservation easement” be introduced that incorporates the definition of conservation easement contained in Pennsylvania’s Conservation and Preservation Easements Act and then adds standards specific to Chapter 93—standards that will ensure consistent water quality protections and not cause the problems inherent in the Board’s preliminary suggestion.

The Association offers the following definition as an example of how this might be accomplished:

“Qualified conservation easement.” A conservation easement as defined by and satisfying the requirements of the Pennsylvania Conservation and Preservation Easements Act, 32 P.S. §§ 5051-5059, that is perpetual in duration and recorded in the county office for the recording of deeds, the purpose of the easement including, but not necessarily limited to, maintaining or improving water quality; the easement’s holder, if not a governmental body, must have adopted the latest edition of Land Trust Standards and Practices, published by the Land Trust Alliance, as its operating guidelines, and the non-governmental holder must covenant to uphold the water quality objectives of the easement in perpetuity.

The Association provides explanation and background for this suggested text in the following sections.

The Department’s suggested additional sentence defining “Outstanding National, State, regional or local resource water” accordingly would be modified to change the term “conservation easements” to “qualified conservation easements.”

Conservation and Preservation Easements Act

Pennsylvania’s Conservation and Preservation Easements Act, 32 P.S. §§ 5051-5059, which was enacted in 2001, defines a “conservation easement” as:

A nonpossessory interest of a holder in real property, whether appurtenant or in gross, imposing limitations or affirmative obligations, the purposes of which include, but are not limited to, retaining or protecting for the public and economic benefit the natural, scenic or open space values of real property; assuring its availability for agricultural, forest, recreational or open space use; protecting, conserving or managing the use of natural resources; protecting wildlife; maintaining or enhancing land, air or water quality or preserving the historical, architectural, archaeological or cultural aspects of real property. (32 P.S. §5053)

This definition and the entirety of the Conservation and Preservation Easements Act provides a strong, well-established grounding for addressing conservation easements in Chapter 93.

To specifically ensure and maximize a conservation easement's continuous contribution to water quality, this definition and the act's other terms are, by themselves, insufficient. In its offered definition of "qualified conservation easement," the Association redresses the deficiencies. Explanation is provided below.

Duration

The act permits easements with durations of 25 years or more and does not require recording. The Association believes that for purposes of Chapter 93, easements should be perpetual, thus the reference to "perpetual in duration" and the requirement for recording.

Purpose

A conservation easement's purpose(s) or objective(s) is its reason for existence. A basic principle in the drafting of easement documents is that each purpose must be backed by covenants—a recipe or rules for carrying out the purpose—to aid the holder in successfully administering the easement. This principle is imbued in the Association's instructional materials and in the many dozens of easement documents crafted by land trusts each year.

Thus, the Association, in its suggested definition, focuses on the easement's purpose because, if the purpose is stated clearly, one can reasonably assume that the easement document's covenants are written to serve that purpose. The *Model Grant of Conservation Easement and Declaration of Covenants, 7th edition*, which is published by the Pennsylvania Land Trust Association at <http://ConservationTools.org> and used by most Pennsylvania land trusts (and many outside of Pennsylvania), illustrates the strong connections drawn between purpose and covenants. The first objective identified in the model is:

To maintain and improve the quality of water resources, both surface and groundwater, within, around, and downstream of the Property.
(§1.04(a)(1))

Numerous covenants back this purpose, including, among others:

- A prohibition on gas and oil extraction that presents any risk to water resources ((§3.02(b)(7))
- Limitations on impervious coverage (§4.01(c))

- A prohibition on agriculture near waterways (§4.02(b)(1))
- A prohibition on forestry unless conducted in accordance with a plan that protects water quality (§4.02(c))

Land Trusts as Holders

The Department takes the approach of requiring government to have an ownership interest in the conservation easement, either as a holder or a beneficiary of the easement. Presumably, this approach assumes that government has greater capacity or willingness to uphold an easement's purpose than a private charitable land trust. The Association believes, based on decades of exemplary land trust conduct—in building common land trust standards and diligently monitoring and enforcing easements—that such an assumption is unfounded.

Furthermore, there are practical ways to ensure that a specific land trust has sufficient capacity to uphold an easement's water quality objectives that do not have to rely on government involvement. The Association suggests the most straightforward approach: require the governing body of the land trust to have adopted the most current edition of *Land Trust Standards and Practices*, as published by the Land Trust Alliance, and to have committed to implementing the Standards as guidelines for the organization's operations. The Standards were most recently updated in 2017; the previous edition was published in 2004. The long-established standards cover practices ranging from conservation easement monitoring to financial management.

(Note: Although, to the Association's knowledge, the provision has never had to be used, the Conservation and Preservation Easements Act provides an ultimate backup in the case of the failure of a land trust: It provides that the conservation easement automatically transfer to the municipality in which the easement is located.)

Commitment

The act does not compel easement holders to uphold their conservation easements. However, Pennsylvania land trusts almost without exception take on this obligation. This is reflected in the *Model Grant of Conservation Easement and Declaration of Covenants*. In §6.01(a), the holder declares the following covenant binding on its easement interest:

Holder must exercise the powers granted to it by this Grant to block activities, uses, and Improvements of the Property inconsistent with the Conservation Objectives.

The Association's suggested definition incorporates this obligation concept.

Note Regarding Amendment

The Department's tentative proposal provides that conservation easements must not be amendable. This notion confuses the property interest (the conservation easement), which provides the holder with the power to block uses of the property inconsistent with the water protection purposes of the easement, with the administrative terms set forth in the granting document to effect the easement purpose. While it would be undesirable to weaken the conservation easement's water protection objective or in any way change the property interest so as to hamper the holder's ability to uphold the water protection objectives, it is thoroughly desirable over the course of decades to be able to modify other terms in the easement document to optimize water quality outcomes if and when opportunities arise. Examples of possible impetus for amendment include:

- Accommodating new technologies or understandings in the protection of water quality.
- Addressing consequences of a natural disaster or climate change that were not anticipated when the easement terms were prepared but which are desirable or necessary to maximize water quality in a changed set of conditions.

The key in making changes to the easement document is to ensure that nothing is done that would weaken the water protection objectives or the means to uphold them. The *Model Grant of Conservation Easement and Declaration of Covenants* again is instructive as to how land trusts approach amendment. Section 6.03 provides for amendment but only within certain strictures:

To enter into an Amendment with Owners if Holder determines that the Amendment: (1) will not impair Holder's power, enforceable in perpetuity, to block activities, uses, and Improvements of the Property inconsistent with the Conservation Objectives; (2) will not result in a private benefit prohibited under the Code; and (3) will be consistent with Holder's policy with respect to Amendment as of the applicable date of reference.

Rules for easement amendment are set forth in Land Trust Standards and Practices. In addition, the Association publishes the *Guide and Model Policy for Conservation Easement Amendment* that guides many organizations. (See http://conservationtools.org/library_items/1317)

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In brief, amendments are important to strengthening conservation protections over time and thus need to be permitted. Land trusts operate within a robust infrastructure that ensures that amendments of easement documents advance rather than diminish conservation protections.

(See the guide *The Nature of the Conservation Easement and the Document Granting It* at <http://conservationtools.org/guides/138> for a more thorough discussion of the relationship of the easement to the easement granting document and mechanisms for ensuring perpetuity.)

Note on “Protection to Significant Reaches”

The new sentence suggested by the Department to be added to the definition of “Outstanding National, State, regional or local resource water” reads:

The term includes a surface water protected by one or more conservation easements situated along a watershed corridor, in a manner that provides protection to significant reaches of the corridor.

The Association suggests excluding the final phrase: “in a manner that provides protection to significant reaches of the corridor.” This text is vague, creating new uncertainty in this effort to bring greater clarity to the role of conservation easements in redesignations.

Conclusion

The Pennsylvania Land Trust Association respectfully submits these comments and hopes they prove constructive in shaping present interpretations and conducting the next triennial review of water quality standards. On behalf of the 75 member organizations of the Pennsylvania Land Trust Association, thank you for your consideration.

Submitted by

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on behalf of the Pennsylvania Land Trust Association