

CRS Report for Congress

Legal Analysis of the Conservation Easement Tax Credit in the Senate Version of H.R. 2419 (the 2007 Farm Bill)

January 24, 2008

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Prepared for Members and
Committees of Congress

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Summary

A conservation easement is a property right whereby a landowner agrees not to develop property. Section 12204 of the Food and Energy Security Act of 2007 (H.R. 2419, as passed by the Senate) would create a new tax credit for taxpayers who agree to protect a qualified species for a specified amount of time under an approved plan. The proposed credit is graduated, so that taxpayers who grant more significant restrictions on their property are able to claim a larger credit. The intent of the proposed credit is that, in exchange for forfeiting the development right, the landowner will receive a tax benefit, the species will gain from having its habitat protected, and the public will have the benefit of conserved property. Providing tax incentives for conservation is not new. Currently, taxpayers may deduct charitable donations made for conservation purposes under Internal Revenue Code (IRC) § 170.

Some say the proposed credit will provide a needed incentive to private landowners to protect at-risk species. Others state that the program may be too broad to enforce adequately, noting that there have been abuses of the tax deduction provided by IRC § 170. Another point of view is that the credit favors temporary efforts disproportionately to permanent conservation and would not provide the public with a good value for the tax credit given. This report will review conservation easements, generally, and discuss issues related to the proposed credit in section 12204 of H.R. 2419, as passed by the Senate, in particular. The House-passed version of H.R. 2419 does not include the tax credit provision. The Senate has insisted on its amendment of H.R. 2419 and requested a conference. House and Senate staff are engaged in active discussion.

The same tax credit provision is found in the Heartland, Habitat, Harvest, and Horticulture Act of 2007 (S. 2242), and similar proposals are included in the Habitat and Land Conservation Act of 2007 (S. 2223) and the Endangered Species Recovery Act of 2007 (H.R. 1422 and S. 700).

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Section 12204 of the Food and Energy Security Act of 2007 (H.R. 2419, as passed by the Senate) would create a new tax credit for taxpayers who agree to protect a qualified species for a specified amount of time under an approved plan.¹ The amount of the credit would depend on whether the taxpayer, as part of the plan, granted a conservation easement to a federal agency or state in order to protect the species' habitat. Conservation easements appeal to both landowners and those who favor environmental protection. Issues arise in balancing the amount of protection provided with the tax credit given, in order to provide a fair public benefit in exchange for the funds. Also, enforcement can prove difficult, in light of the expanse of the program, the fact-specific nature of monitoring, and the number of parties that could be involved.

The House-passed version of H.R. 2419 does not include the proposed tax credit.² The Senate has insisted on its amendment of H.R. 2419 and requested a conference. House and Senate staff are engaged in active discussion.

What is a Conservation Easement?

An easement is a property right. Easements were created by common law centuries ago and have been refined by state case law.

Generally, an easement allows one property to be used to benefit another property. Often, an easement is viewed as a property right allowing an owner of neighboring land to use adjoining property, such as for a driveway, or beach access. However, easements can also be granted to benefit the public more generally, such as in the case of the easement taken around Copley Square in Boston, limiting the

¹ An identical provision is found in the Heartland, Habitat, Harvest, and Horticulture Act of 2007 (S. 2242) and similar provisions are included in the Habitat and Land Conservation Act of 2007 (S. 2223) and the Endangered Species Recovery Act of 2007 (H.R. 1422 and S. 700).

² For more information on H.R. 2419, see CRS Report RL34228, *Comparison of the House and Senate 2007 Farm Bills*, by Renee Johnson, Geoffrey S. Becker, Tom Capehart, Ralph M. Chite, Tadlock Cowan, Ross W. Gorte, Charles E. Hanrahan, Remy Jurenas, Jim Monke, Jean M. Rawson, Randy Schnepf, Jasper Womach, Jeffrey A. Zinn, Joe Richardson; CRS Report RS22759, *Farm Legislation and Taxes in the 110th Congress*, by David L. Brumbaugh.

height of buildings so that historic buildings would not be overwhelmed.³ As also shown by the Copley Square easement, easements do not have to grant access to tracts of land. Less tangible property rights may be conveyed, for example, the easements for light and air allowed in New York City, whereby one property conveys its right to light and open space above its building to another.

Easements are more than a mere agreement between two parties. They are described as “running with the land,” meaning they attach to the property, not to the people agreeing to them. To accomplish this the easements must do more than grant a mere personal right to the property. For private easements, there must be some sort of connection between the properties that creates a reason for the easement and conveys a benefit. The agreement must have all the formality of a deed, such as being filed, and should state that the easement runs with the land. When an easement has been conveyed, the property that has the benefit of the easement is known as the dominant estate. The property upon which the easement exists is known as the servient estate. In the case of the public easements, such as is described above in the Copley Square case, the dominant estate is held by the public as a whole. When the terms of the easement mean the servient estate is prevented from unfettered use of the property, it is known as a negative easement. An affirmative easement gives the easement holder the right to use the property in a limited way, such as the right to travel across land.

A *conservation easement* is a relatively new form of property compared to the long history of easements. It is most similar to a public easement, and is a form of a negative easement because it restricts landowners from using their property in certain ways. A conservation easement preserves the land in the condition it is at the time of the conveyance. One could be granted for several reasons — to preserve undeveloped property, to achieve open space goals of a community, to maintain agricultural land, or to preserve land for the benefit of wildlife, for example. To some extent it could be argued that the conservation easement is a hybrid of a negative easement and an affirmative easement. As discussed earlier, it does prohibit a landowner from using their property at will. However, it also could allow the right of access, especially in the instance of easements provided for wildlife protection. Scientific observation or monitoring could be required in that instance. Or an affirmative easement could occur in the case of a conservation easement that requires public access in order to qualify for tax benefits.

Current Tax Treatment of Donations of Conservation Easements.

Under current law, a taxpayer who donates a conservation easement to a governmental unit or tax-exempt organization may be able to deduct the donation as a charitable contribution.⁴ The donation must meet three requirements. First, it must be of a qualified real property interest, of which a perpetual easement is one type. Second, the donation must be made to a qualifying organization, such as a governmental unit or public charity. Third, it must be made exclusively for a conservation purpose. Conservation purposes are (1) the preservation of land for outdoor recreation by, or the education of, the general public, (2) the protection of a

³ See *Attorney General v. Williams*, 174 Mass. 476, 55 N.E. 77 (Oct. 30, 1999).

⁴ Internal Revenue Code (IRC) § 170(h).

natural habitat of fish, wildlife or plants, or similar ecosystems, (3) the preservation of open space for the scenic enjoyment of the general public or pursuant to a clearly delineated governmental policy, so long as the preservation will yield a significant public benefit, and (4) the preservation of historically important land areas and certified historic structures.

Proposed Endangered Species Recovery and Restoration Credit in the Senate Version of the 2007 Farm Bill

Section 12204 of the Senate-passed version of H.R. 2419 (Food and Energy Security Act of 2007) would create an “endangered species recovery and restoration credit” for taxpayers who agree to protect a qualified species for a specified amount of time under an approved habitat management plan. The credit is composed of two separate credits: (1) the *habitat restoration credit* for taxpayers who agreed to a habitat management plan for qualified species’ recovery and (2) the *habitat protection easement credit* for taxpayers who agreed, as part of that plan, to grant an easement to their property in order to protect the species. Qualified species would be “any species listed as an endangered species or threatened species under the Endangered Species Act” (ESA) (16 U.S.C. §§ 1531- 1544) or “any species for which a finding has been made ... that listing under [the ESA] may be warranted.”

Qualified Habitat Protection Agreement. In order to claim the endangered species recovery and restoration credit, the taxpayer would be required to enter into a “qualified habitat protection agreement.” This agreement would need to: (1) include a habitat management plan agreed to by the appropriate Secretary⁵ and the taxpayer, (2) be consistent with any applicable recovery plan approved for a qualified species under the ESA, (3) be certified by the appropriate Secretary as contributing to the recovery of a qualified species, and (4) require technical assistance be provided to taxpayers for carrying out their duties under the plan.

The habitat management plan required under the agreement must identify at least one qualified species to be protected. The plan could restore or enhance the qualified species’ habitat, or reduce threats to the species through habitat management. The plan would need to describe the habitat’s current condition, threats to the species that the plan was intended to reduce, management practices to be undertaken by the taxpayer, and technical assistance to be provided to the taxpayer. The plan would also need to provide deadlines relating to, and require monitoring of, the undertaking of the management practices and the expected responses of the species and its habitat.

The new credit would distinguish between qualified habitat protection agreements on the basis of whether or not the agreement included an easement. The taxpayer could grant an easement for the protection of a qualified species’ habitat to

⁵ Under the bill, the appropriate Secretary generally refers to the Secretary of the Interior or the Secretary of Commerce.

the Secretaries of the Interior, Commerce, Agriculture, or Defense, or to a state. The granting of such an easement, and its length, would affect the amount of the credit that could be claimed, as discussed below. The bill would classify agreements into three categories:

- agreements in which the taxpayer granted an easement in perpetuity,
- agreements in which the taxpayer granted an easement for a period of at least 30 years, and
- any other agreements in which the taxpayer agreed to protect the qualified species' habitat for a specified period of time.

Credit Amount. As mentioned, there are two components to the endangered species recovery and restoration credit: the habitat restoration credit and the habitat protection easement credit. The habitat restoration credit is based on the costs paid or incurred during the year pursuant to the habitat management plan. The habitat protection easement credit is based on the value of any easement granted by the taxpayer under the habitat protection agreement.

The habitat restoration credit would equal: (1) 100% of the costs paid or incurred by the taxpayer during the year pursuant to the habitat management plan if the habitat protection agreement included a perpetual easement, (2) 75% of those costs if the agreement included an easement granted for at least 30 years, and (3) 50% of those costs in all other cases. The costs for which the credit could be claimed would be reduced by the amount of any financing provided under a federal or state program that subsidized financing for the conservation of qualified species' habitat. Additionally, the costs would not include those paid to comply with any federal, state, or local requirement, other than those paid or incurred under the agreement. The taxpayers eligible to claim the credit would be both the property owners who entered into the habitat protection agreement and any parties who agreed to assume responsibility for the costs of its implementation.

The habitat protection easement credit would equal: (1) the reduction in the property's value due to the habitat protection agreement if such agreement included an easement granted in perpetuity (essentially the value of the easement), (2) 75% of the reduction if the agreement included an easement granted for at least 30 years (essentially 75% of the easement's value), and (3) zero in all other cases. Only the property owner who granted the easement would be eligible for the credit. The credit would be reduced by any amount the taxpayer received in connection with the easement and would be disallowed if the taxpayer failed to provide the IRS with a qualified appraisal of the property.

Several limitations apply to the amount that could be claimed as the credit, including the allocation limitations discussed in the next section.

Allocation Limits. Taxpayers could claim the credit only if it had been allocated to them by the Treasury Secretary. The bill would set a nation-wide limit on the amount that could be allocated annually and provides for no new credit allocations after 2012. For each year from 2008 through 2012, the Treasury Secretary, in consultation with the Secretaries of the Interior and Commerce, could allocate \$290 million for habitat protection agreements with perpetual easements,

\$55 million for agreements with 30-year easements, and \$35 million for all other agreements. The Treasury Secretary would be required to establish by regulation, within 180 days of the act's enactment and in consultation with the Secretaries of the Interior and Commerce, a program to process applications for the credit. Priority under the program would be given to taxpayers with agreements:

- relating to habitats that would significantly increase the likelihood of recovering and delisting an endangered or threatened species,
- that are cost-effective and would maximize the benefit to a qualified species per dollar expended,
- relating to habitats of species with a federally-approved recovery plan pursuant to ESA § 4,
- relating to habitats with the potential to contribute significantly to the improvement of the status of a qualified species,
- relating to habitats with the potential to contribute significantly to the eradication or control of invasive species imperiling a qualified species,
- with habitat management plans that would manage multiple qualified species,
- with habitat management plans that would create adjacent or proximate habitat for the recovery of a qualified species,
- relating to habitats for qualified species with an urgent need for protection,
- with habitat management plans that would assist in preventing the listing of a species as endangered or threatened under the ESA or similar state law,
- with habitat management plans that could resolve conflicts between the protection of qualified species and otherwise lawful human activities, and
- with habitat management plans that could resolve conflicts between the protection of a qualified species and military training or other military operations.

The Treasury Secretary would also be authorized to annually allocate during that same time period, in consultation with the Secretary of Agriculture, \$5 million for agreements with perpetual easements, \$2 million for agreements with 30-year easements, and \$1 million for all other agreements.

Any amount not allocated by the Treasury Secretary would be added to the following year's allocation. Taxpayers could carryforward any credit unclaimed due to the allocation limitation to the next taxable year for which an allocation was made to that taxpayer. Similarly, taxpayers could carryforward any unused allocation to the next taxable year.

Basis Reduction. For taxpayers claiming the habitat restoration credit, any increase in the property's basis to account for a capital expenditure would be reduced by the amount of the credit allowed. For taxpayers claiming the habitat protection easement credit, the property's basis would be reduced by the amount of basis that would be allocated to the easement under Treasury regulations.

Takings of Listed Species. The Treasury Secretary would be required to request that the appropriate Secretary consider whether to authorize, under the ESA, the taking by the taxpayer of the qualified species if such taking was incidental to either (1) the habitat's restoration, enhancement, or management pursuant to the plan or (2) the property's use after the expiration of the easement or period specified in the agreement if the use would leave the qualified species at least as well off as it was prior to the agreement.⁶

No Double Benefit. Any amount for which a credit was allowed could not also be deducted or used to benefit from another credit.

Recapture. The Treasury Secretary would be required to promulgate regulations to provide for recapturing the credit in the event that taxpayers failed to carry out their duties under the agreement and there were no other available means to remediate the failure.

GAO Study. The Government Accountability Office (GAO) would be required to report to Congress on the credit's effectiveness and provide recommendations to improve it. An interim report would be due within three years of the act's enactment date, and the final report would be due within five years of such date.

Effective Date. The endangered species recovery and restoration tax credit would be available in taxable years beginning after December 31, 2007. As discussed above, the bill only allocates credits through 2012.

Legal Analysis of Proposed Credit

Conservation Easements In General. One limitation on conservation easements in general is that they are disfavored under common law. The reason is that except for public easements, easements must benefit a neighboring, or appurtenant, property. A conservation easement could be seen as benefitting only the property itself, since it is only conserving that area. Or it could be labeled as an easement in gross, which is an easement the use of which it is not dependent on owning a dominant estate. Easements in gross are subject to challenge, as they can be characterized as more of a personal agreement, rather than a true property right.

Courts look at whether easements *touch and concern* land, to determine whether the agreement is more than a mere contract. There is no pat test for when an agreement touches and concerns the land. To succeed, either the benefit or the burden of the agreement must directly affect land, rather than an individual. An argument could be made that adjoining properties benefit from undeveloped, preserved space next door. However, under this proposed legislation, adjoining properties probably would not be the easement holders.

⁶ All other incidental take permits under the ESA are requested by the permittee. See page 8 for more discussion on this.

A second problem that can occur when the easement is held by someone other than a neighbor, is that the oversight a neighbor provides is lost. Common law easements could be monitored daily by the landowner next door.⁷ In the case of a statutorily mandated easement, the easement holder could be thousands of miles away.

The 30-Year Habitat Protection Easement. The legislation would allow the habitat protection easements to receive tax benefits: either a tax credit in the amount of value the property loses by entering the easement, if a permanent easement; or up to 75 percent of that value if a 30-year easement is entered. The 30-year easement has a recent precedent under the Healthy Forest Restoration Act of 2003.⁸ That law provided a tax credit of up to 75 percent to landowners who issued a 30-year easement to restore and enhance habitat for species listed under the ESA.

A 30-year easement appears to contradict the basic distinction between an easement and a contract. As mentioned earlier, an easement is considered a property right, not a contract. It is presumed to last as long as the land. Based on this fundamental concept of easements, a 30-year term is more in the nature of an agreement between parties than it is a property right. Under the proposed provision, a property owner could enter a 30-year easement and obtain a tax credit worth 75 percent of the value lost, and still have the full use of the property after 30 years. Considering the enduring nature of property and of species protection, 30 years may not be a significant time period. Other landowners would be restricting development on their property permanently for just 25 percent more in tax credits. Some question the relative value of the benefit to the public compared to the tax benefit received by the landowner.

Number of Parties. One potentially problematic aspect of this legislation, in terms of its practical application, is the number of parties that could be involved in each agreement. It is possible for three parties to be involved: the easement holder, which would be an agency or a state; the agency that approves the habitat management plan; and the agency that enforces the easement.

Easement holders could come from many sources. Under the bill, the easements would be held by the Secretary of the Interior, the Secretary of Commerce, the Secretary of Agriculture, the Secretary of Defense, or a State. Each of these agencies would need a system to keep track of easements that they hold, and in the case of the Department of the Interior (DOI), also track the habitat management plans they have approved. The IRS would have to track these agreements too. These parties could each have enforcement responsibilities, as easement holders traditionally ensure the easement is in place, and this bill implies that enforcement would be allowed by either the IRS or the easement holder. There could be conflicts among the parties

⁷ For a discussion of the problems with conservation easements in general, *see* Mary Ann King and Sally K. Fairfax, *Public Accountability and Conservation Easements: Learning from the Uniform Conservation Easement Act Debates*, 46 *Nat. Resources J.* 65 (Winter 2006).

⁸ P.L. 108-148, Title V, 117 Stat. 1887 (Dec. 3, 2003); 16 U.S.C. § 6501 (the Healthy Forests Reserve Program).

with the right to enforce if there were disagreements as to whether the terms of the easement had been met.

The habitat management plan would be approved by either DOI or the Department of Commerce (DOC). However, it is not clear which agency would consider whether the easement is consistent with Section 4 of the ESA, as required by the bill. Also, the habitat management plan is referred to as an agreement, but it is not clear whether or what enforcement rights the DOI or DOC would have as parties to that agreement. Again, there could be a conflict between what DOI or DOC considered a breach in the terms of that agreement, and whether the easement holder considered the terms of the agreement broken.

The bill would require the Treasury Secretary to request any incidental take permit for the landowner at the time of the easement or following the easement's cessation. The permit, which is found under Section 10 of the ESA, is usually sought by the permittee. It is possible that this is a method of ensuring the conservation purposes of the act are met, by restricting application to injure or harm a protected species, even after the easement has expired. It would keep the IRS involved in the process long after the tax credit had been claimed.

No Description of the Terms of the Easement. Under this bill, there are no guidelines for the terms of the easement, such as might clarify enforcement. The easement should have an express provision allowing a right of access for monitoring.

Expansive Funding Increases Enforcement Duties. This bill would have significantly more authorized funds than either IRC § 170 or the Healthy Forest Reserve Program. A total of \$8 million is available to the three types of qualified habitat protection plans, per calendar year, made by the USDA, and \$380 million is available for those issued by the DOI and DOC, annually. In contrast, the first authorized funding for the Healthy Forest Reserve Program was for \$25 million.

Uncertain Goals of Habitat Management. A list of priorities is provided for determining which applicant taxpayers should get the tax credit. The list includes eleven items and has no hierarchy. The eleventh priority, "habitat management plans that may resolve conflicts between the protection of a qualified species and military training or other military operations," does not seem to apply to private landowners that are the subject of this bill. Yet it is given the same importance as the first-listed priority, "habitats that will significantly increase the likelihood of recovering and delisting a species," which is the goal of the ESA.

The Public Benefit. Under the ESA, it is against the law to harm an endangered species, including habitat destruction that leads to injury or death (ESA § 9; 15 U.S.C. § 1538), and some special rules may prohibit harming threatened species. (See CFR Title 50.) This means that landowners are already prohibited from modifying their property in a way that could harm an endangered species.⁹ In those

⁹ An analogous situation occurred where taxpayers claimed a historic property benefit, even though under local law, their property was already restricted under historic preservation (continued...)

cases where an endangered species exists, the habitat conservation easement could be viewed as a landowner receiving compensation for obeying the law. In the case of endangered qualified species, the only difference between the status quo and the habitat protection easement is the habitat management plan. On the other hand, it could be seen more in the nature of compensation for a taking of a property right. In that case, the short-term easement is less meaningful, as a constitutional taking is said to be a permanent restriction on the use of property.

Litigation Regarding Enforcement. There have been enforcement issues with charitable easement donations under IRC § 170 according to the Internal Revenue Service, and the IRS Commissioner testified in 2006 that the agency “has seen abuses that compromise the policies and the public benefit that Congress intended to promote.”¹⁰ Similar problems could surface with this credit program. For example, it appears that determining whether an easement or underlying agreement is in compliance with the law could require site visits, a nearly impossible task for the IRS and the other agencies that would be involved. In addition to fact-intensive reviews, there is also the problem that some of these easements, and their attendant habitat management plans, are intended to be enforced in perpetuity.

Case law illustrates the complexities in enforcing conservation easements. For one thing, compliance is based on site-specific facts. For example, to find whether a wildlife sanctuary was serving its conservation purpose for a state tax credit, a court had to review what public access was available to the site.¹¹ In one case under IRC § 170, easements for conserving property along Lake Michigan were designed to preserve natural resources, including habitat for threatened plants, while also allowing the taxpayers to build additional footpaths to the beach, construct a boathouse, trim trees, and move plants. In determining the permissibility of the claimed deduction, courts closely looked at the easements, with the Sixth Circuit concluding that they were “carefully drawn to prohibit any activity or use of the encumbered property that would undermine their stated conservation purpose.”¹²

There may also be concern about possible overvaluation of the easements. For purposes of the charitable contribution deduction under IRC § 170, the value of an easement is generally determined by comparing the value of property subject to the

⁹ (...continued)

laws. Because the taxpayers did not actually surrender a development right, the court held they were not entitled to the tax benefit. *Turner v. Comm’r*, 126 T.Ct. 299 (2006).

¹⁰ Steven T. Miller, Testimony Before the Senate Committee on Finance (June 8, 2005) (Commissioner Miller Testimony), online at [<http://www.irs.gov/pub/irs-tege/smttest060805.pdf>].

¹¹ *Adirondack Land Trust, Inc. v. Town of Putnam Assessor*, 203 A.D.2d 861, 611 N.Y.S.2d 332 (N.Y. App. Div. 3d. 1994) (finding that even though public use of the property was limited, the not-for-profit had made it accessible suitable to the characteristics of wildlife sanctuary).

¹² *Glass v. Comm’r*, 471 F.3d 698 (6th Cir. 2006).

easement with and without the restriction.¹³ Donations are subject to substantiation and appraisal requirements. Even with these safeguards, there have been concerns about taxpayers overvaluing easements in determining the amount of the deduction,¹⁴ and similar concerns could be raised with the credit program.

Another enforcement issue could arise with credit recapture. Under the bill, the Treasury Secretary is directed to promulgate regulations for recapturing the credit should taxpayers fail to carry out their duties under the habitat protection agreement and “there are no other available means to remediate such failure.” The recapture provision appears unusual in that it requires there be no other means available to remedy the taxpayer’s noncompliance, rather than simply requiring noncompliance by the taxpayer.

Conclusion

Section 12204 of the Food and Energy Security Act of 2007 (H.R. 2419, as passed by the Senate) would create a new tax credit for taxpayers who agreed to protect a qualified species for a specified amount of time under an approved plan. The intent of the proposed credit is that, in exchange for forfeiting the development right to property, the landowner will receive a tax benefit, the habitat of endangered or threatened species will be protected, and the public will have the benefit of conserved property and protected species. While environmentalists and landowners appear united in wanting a method of conserving property in exchange for a tax credit, some aspects of this proposed legislation could complicate the public benefit intended. Those factors include an uncertain enforcement scheme in which several agencies could be involved, difficulty in monitoring compliance due to the scope of the program and uncertain provisions allowing access to the property, and the temporary nature of some of the protections provided.

¹³ See Treas. Reg. § 1.170A-14(h)(3).

¹⁴ See, e.g., Commissioner Miller Testimony, *supra* note 10.