Calendar No. 442

110TH CONGRESS *1st Session* | SENATE | REPORT 110–205

HABITAT AND LAND CONSERVATION ACT OF 2007

OCTOBER 24, 2007.—Ordered to be printed

Mr. BAUCUS, from the Committee on Finance, submitted the following

R E P O R T

[To accompany S. 2223]

The Committee on Finance, having considered an original bill, S. 2223, to amend the Internal Revenue Code of 1986 to provide additional tax incentives to promote habitat conservation and restoration, and for other purposes, reports favorably thereon and recommends that the bill do pass.

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I. LEGISLATIVE BACKGROUND

The Senate Committee on Finance marked up an original bill, S. 2223 (the "Habitat and Land Conservation Act of 2007") on September 21, 2007, and, with a majority and quorum present, ordered the bill favorably reported by a voice vote on that date.

II. EXPLANATION OF THE BILL

A. Make Permanent the Special Rule Encouraging Contributions of Capital Gain Real Property for Conservation Purposes

(Sec. 2 of the bill and sec. 170 of the Code)

PRESENT LAW

Charitable contributions generally

In general, a deduction is permitted for charitable contributions, subject to certain limitations that depend on the type of taxpayer, the property contributed, and the donee organization. The amount of deduction generally equals the fair market value of the contributed property on the date of the contribution. Charitable deductions are provided for income, estate, and gift tax purposes.[1]

In general, in any taxable year, charitable contributions by a corporation are not deductible to the extent the aggregate contributions exceed 10 percent of the corporation's taxable income computed without regard to net operating or capital loss carrybacks. For individuals, the amount deductible is a percentage of the taxpayer's contribution base, which is the taxpayer's adjusted gross income computed without regard to any net operating loss carryback. The applicable percentage of the contribution base varies depending on the type of donee organization and property contributed. Cash contributions of an individual taxpayer to public charities, private operating foundations, and certain types of private nonoperating foundations may not exceed 50 percent of the taxpayer's contribution base. Cash contributions to private foundations and certain other organizations generally may be deducted up to 30 percent of the taxpayer's contribution base.

In general, a charitable deduction is not allowed for income, estate, or gift tax purposes if the donor transfers an interest in property to a charity while also either retaining an interest in that property or transferring an interest in that property to a noncharity for less than full and adequate consideration. Exceptions to this general rule are provided for, among other interests, remainder interests in charitable remainder annuity trusts, charitable remainder unitrusts, and pooled income funds, present interests in the form of a guaranteed annuity or a fixed percentage of the annual value of the property, and qualified conservation contributions.

Capital gain property

Capital gain property means any capital asset or property used in the taxpayer's trade or business the sale of which at its fair mar-

[1] Secs. 170, 2055, and 2522, respectively. Unless otherwise provided, all section references are to the Internal Revenue Code of 1986, as amended (the "Code").

ket value, at the time of contribution, would have resulted in gain that would have been long-term capital gain. Contributions of capital gain property to a qualified charity are deductible at fair market value within certain limitations. Contributions of capital gain property to charitable organizations described in section 170(b)(1)(A) (e.g., public charities, private foundations other than private non-operating foundations, and certain governmental units) generally are deductible up to 30 percent of the taxpayer's contribution base. An individual may elect, however, to bring all these contributions of capital gain property for a taxable year within the 50-percent limitation category by reducing the amount of the contribution deduction by the amount of the appreciation in the capital gain property. Contributions of capital gain property to charitable organizations described in section 170(b)(1)(B) (e.g., private non-operating foundations) are deductible up to 20 percent of the taxpayer's contribution base.

For purposes of determining whether a taxpayer's aggregate charitable contributions in a taxable year exceed the applicable percentage limitation, contributions of capital gain property are taken into account after other charitable contributions. Contributions of capital gain property that exceed the percentage limitation may be carried forward for five years.

Qualified conservation contributions

Qualified conservation contributions are not subject to the "partial interest" rule, which generally bars deductions for charitable contributions of partial interests in property. A qualified conservation contribution is a contribution of a qualified real property interest to a qualified organization exclusively for conservation purposes. A qualified real property interest is defined as: (1) The entire interest of the donor other than a qualified mineral interest; (2) a remainder interest; or (3) a restriction (granted in perpetuity) on the use that may be made of the real property. Qualified organizations include certain governmental units, public charities that meet certain public support tests, and certain supporting organizations. Conservation purposes include: (1) The preservation of land areas for outdoor recreation by, or for the education of, the general public; (2) the protection of a relatively natural habitat of fish, wildlife, or plants, or similar ecosystem; (3) the preservation of open space (including farmland and forest land) where such preservation will yield a significant public benefit and is either for the scenic enjoyment of the general public or pursuant to a clearly delineated Federal, State, or local governmental conservation policy; and (4) the preservation of an historically important land area or a certified historic structure.

Qualified conservation contributions of capital gain property are subject to the same limitations and carryover rules of other charitable contributions of capital gain property.

Special rule regarding contributions of capital gain real property for conservation purposes

In general

Under a temporary provision that is effective for contributions made in taxable years beginning after December 31, 2005,[2] the 30-percent contribution base limitation on contributions of capital gain property by individuals does not apply to qualified conservation contributions (as defined under present law). Instead, individuals may deduct the fair market value of any qualified conservation contribution to an organization described in section 170(b)(1)(A) to the extent of the excess of 50 percent of the contribution base over the amount of all other allowable charitable contributions. These contributions are not taken into account in determining the amount of other allowable charitable contributions.

Individuals are allowed to carryover any qualified conservation contributions that exceed the 50-percent limitation for up to 15 years.

For example, assume an individual with a contribution base of $100 makes a qualified conservation contribution of property with a fair market value of $80 and makes other charitable contributions subject to the 50-percent limitation of $60. The individual is allowed a deduction of $50 in the current taxable year for the non-conservation contributions (50 percent of the $100 contribution base) and is allowed to carryover the excess $10 for up to 5 years. No current deduction is allowed for the qualified conservation contribution, but the entire $80 qualified conservation contribution may be carried forward for up to 15 years.

Farmers and ranchers

In the case of an individual who is a qualified farmer or rancher for the taxable year in which the contribution is made, a qualified conservation contribution is allowable up to 100 percent of the excess of the taxpayer's contribution base over the amount of all other allowable charitable contributions.

In the above example, if the individual is a qualified farmer or rancher, in addition to the $50 deduction for non-conservation contributions, an additional $50 for the qualified conservation contribution is allowed and $30 may be carried forward for up to 15 years as a contribution subject to the 100-percent limitation.

In the case of a corporation (other than a publicly traded corporation) that is a qualified farmer or rancher for the taxable year in which the contribution is made, any qualified conservation contribution is allowable up to 100 percent of the excess of the corporation's taxable income (as computed under section 170(b)(2)) over the amount of all other allowable charitable contributions. Any excess may be carried forward for up to 15 years as a contribution subject to the 100-percent limitation.[3]

As an additional condition of eligibility for the 100-percent limitation, with respect to any contribution of property in agriculture or livestock production, or that is available for such production, by a qualified farmer or rancher, the qualified real property interest

[2] Sec. 170(b)(1)(E).
[3] Sec. 170(b)(2)(B).

must include a restriction that the property remain generally available for such production. (There is no requirement as to any specific use in agriculture or farming, or necessarily that the property be used for such purposes, merely that the property remain available for such purposes.) Such additional condition does not apply to contributions made on or before August 17, 2006.

A qualified farmer or rancher means a taxpayer whose gross income from the trade or business of farming (within the meaning of section 2032A(e)(5)) is greater than 50 percent of the taxpayer's gross income for the taxable year.

Termination

The special rule regarding contributions of capital gain real property for conservation purposes does not apply to contributions made in taxable years beginning after December 31, 2007.

REASONS FOR CHANGE

Gifts of conservation easements to organizations that are dedicated to maintaining natural habitats, open spaces, or traditional agriculture help protect our nation's heritage. The charitable tax deduction for such conservation easements has proven to be a valuable incentive for making such gifts. The Committee believes that the special rule that provides an increased incentive to make charitable contributions of partial interests in real property for conservation purposes is an important way of encouraging conservation and preservation and should be made permanent.

EXPLANATION OF PROVISION

The provision makes permanent the special rule regarding contributions of capital gain real property for conservation purposes.

EFFECTIVE DATE

The provision is effective for contributions made in taxable years beginning after December 31, 2007.

B. Provide Tax Credit for Recovery and Restoration of Endangered Species

(Sec. 3 of the bill and new sec. 30D of the Code)

PRESENT LAW

Present law does not provide an income tax credit for endangered species recovery expenditures.

REASONS FOR CHANGE

The Endangered Species Act ("ESA") of 1973 is a comprehensive attempt to protect species at risk of extinction and to consider habitat protection as an integral part of that effort.

The purpose of the ESA is to conserve the ecosystems upon which endangered and threatened species depend and to conserve and recover listed species. Under the ESA, species of plants and animals (both vertebrate and invertebrate) may be listed as either endangered or threatened according to assessments of the risk of their extinction.

As of September 20, 2007, according to the U.S. Fish and Wildlife Service ("USFWS"), a total of 744 species of plants and 607 species of animals had been listed as either endangered or threatened in the United States and its territories. According to the USFWS, over 70 percent of the nation's landscape is in private ownership and nearly two-thirds of Federally listed endangered and threatened species are found on private lands. With such a large number of the country's listed species dependent upon private lands for their survival, and many exclusively so, the goals of the ESA cannot be accomplished without the Federal government becoming involved to provide incentives for species protection on private lands. For both plants and animals, the ESA has few provisions for restoring and managing habitats on private lands. Many important habitats require restoration and management because, among other things, they have been overrun by invasive species or have been deprived of exposure to fire and other natural processes.

Although the ESA prohibits landowners from harming endangered or threatened species, the Act itself contains only a small number of incentives for landowners to undertake the beneficial management actions that most species require for recovery. In addition, while most private landowners care about their land and want to practice good stewardship, they often lack the time and resources to deal with complex regulations and necessary management activities.

The Committee believes that tax credits for private landowners who voluntarily undertake habitat protection and restoration for endangered species will provide some needed incentives to help recover threatened and endangered species.

EXPLANATION OF PROVISION

In general

For eligible taxpayers, the provision establishes a credit against income taxes for: (1) Costs paid or incurred by an eligible taxpayer for the taxable year (reduced by the amount of government financing for conservation of a qualified species, and not including costs required by a Federal, State, or local government) pursuant to a habitat management plan entered into under certain qualified habitat protection agreements ("habitat restoration credit") and (2) a percentage of the loss in value to real property attributable to an easement placed on the property pursuant to such agreements (less any amount received in connection with the easement) ("habitat protection easement credit"). The allowable credit amount is 100 percent of costs paid or incurred and the loss in value to property pursuant to qualified perpetual habitat protection agreements; 75 percent of costs paid or incurred and the loss in value to property pursuant to qualified 30-year habitat protection agreements; and 50 percent of costs paid or incurred pursuant to a qualified habitat protection agreement.

For purposes of the habitat protection easement credit, the loss in value is the difference between the fair market value of the real property subject to the agreement determined on the day before the agreement is entered into less the fair market value of such property determined one day after the agreement is entered into. To claim such credit, the eligible taxpayer must own the real property

with respect to which the easement is placed, and include on the tax return for the taxable year a qualified appraisal (within the meaning of section 170(f)(11)(E)) of the real property. The taxpayer's basis in such property is reduced by the amount of the credit allowed.

The habitat restoration credit is taken into account after other credits (sections 21–27, 30, 30B, 30C, and the habitat protection easement credit) and may not offset the alternative minimum tax. The habitat protection easement credit is taken into account after other credits (sections 21–27, 30, 30B, and 30C) and such credit may offset the alternative minimum tax. Amounts allowed but in excess of either limitation may be carried forward to the succeeding taxable year. No deduction is allowed for any amount with respect to which a credit is allowed. The Secretary of the Treasury shall by regulations provide for the recapture of the credit if such Secretary determines that the eligible taxpayer has failed to carry out the duties required by the qualified agreement and there are no other available means to remediate such failure.

The sum of the two credits may not exceed the amount allocated to the eligible taxpayer by the Secretary of the Treasury, in consultation with the Secretary of the Interior and the Secretary of Commerce, for the calendar year in which the taxpayer's taxable year ends. If the amount allowed as a credit exceeds the amount allocated for such year, the excess may be carried forward to the next taxable year for which the taxpayer has received an allocation. If the amount allocated to a taxpayer for a calendar year exceeds the amount allowed as a credit for such year, the difference may be carried forward to the next taxable year and treated as allocated to the taxpayer for use in such year. No credit is allowed unless the appropriate Secretary certifies that a qualified agreement will contribute to the recovery of a qualified species.

The aggregate amount allocated by the Secretary of the Treasury may not exceed in each year 2008 through 2012: $290,000,000 with respect to qualified perpetual habitat protection agreements, $55,000,000 with respect to qualified 30-year habitat protection agreements, and $35,000,000 with respect to qualified habitat protection agreements. No allocation is allowed after 2012, except that unallocated amounts with respect to any calendar year are carried forward to the allowable allocation for the next calendar year.

Not later than 180 days after the date of enactment, the Secretary of the Treasury, in consultation with the Secretary of the Interior and the Secretary of Commerce, shall by regulation establish a program to process applications from eligible taxpayers and to determine how best to allocate the credit. In allocating the credit, priority shall be given to taxpayers with agreements (1) relating to habitats that will significantly increase the likelihood of recovering and delisting a species as an endangered species or a threatened species (as defined under section 2 of the Endangered Species Act of 1973), (2) that are cost-effective and maximize the benefits to a qualified species per dollar expended, (3) relating to habitats of species that have a Federally approved recovery plan pursuant to section 4 of the Endangered Species Act of 1973, (4) relating to habitats with the potential to contribute significantly to the improvement of the status of a qualified species, (5) relating to habitats with the potential to contribute significantly to the eradication

or control of invasive species that are imperiling a qualified species, (6) with habitat management plans that will manage multiple qualified species, (7) with habitat management plans that will create adjacent or proximate habitat for the recovery of a qualified species, (8) relating to habitats for qualified species with an urgent need for protection, (9) with habitat management plans that assist in preventing the listing of a species as endangered or threatened under the Endangered Species Act of 1973 or a similar State law, (10) with habitat management plans that may resolve conflicts between the protection of qualified species and otherwise lawful human activities, and (11) with habitat management plans that may resolve conflicts between the protection of a qualified species and military training or other military operation.

The Secretary of the Treasury shall request that the appropriate Secretary consider whether to authorize under the Endangered Species Act of 1973 takings by an eligible taxpayer of a qualified species to which a qualified agreement relates if the takings are incidental to (1) the restoration, enhancement, or management of the habitat pursuant to the habitat management plan under the agreement or (2) the use of the property to which the agreement pertains at any time after the expiration of the easement (or specified period of time pursuant to a qualified habitat protection agreement), but only if such use will leave the qualified species at least as well off on the property as it was before the agreement was made. Both types of incidental takings currently are authorized under section 10(a)(1) of the Endangered Species Act of 1973 (enhancement of survival permits) and 50 CFR part 17 (safe harbor permits).

The Comptroller General of the United States shall undertake a study on the effectiveness of the credits. Such study shall evaluate the effectiveness of the credits in encouraging landowners to enter into agreements for the protection of the habitats of endangered and threatened species, and the degree to which such agreements are effective in preserving the habitats of such species and assisting in the recovery of such species, and shall include recommendations for improving the effectiveness of the credits. The Comptroller General shall issue an interim report based on such study within three years of the date of enactment and a final report within five years of such date.

Definitions

Eligible taxpayer

An eligible taxpayer is (1) a taxpayer who owns real property that contains habitat of a qualified species and enters into a qualified perpetual habitat protection agreement, a qualified 30-year habitat protection agreement, or a qualified habitat protection agreement with the appropriate Secretary with respect to such real property, and (2) a taxpayer who is a party to a qualified perpetual habitat protection agreement, a qualified 30-year habitat protection agreement, or a qualified habitat protection agreement and, as part of any such agreement, agrees to assume responsibility for some or all of the costs paid or incurred as a result of implementing such agreement.

Qualified agreements

A qualified perpetual habitat protection agreement is an agreement under which an easement is granted to the appropriate Secretary, the Secretary of Agriculture, the Secretary of Defense, or a State to protect the habitat of a qualified species in perpetuity. A qualified 30-year habitat protection agreement is an agreement under which an easement is granted to the appropriate Secretary, the Secretary of Agriculture, the Secretary of Defense, or a State to protect the habitat of a qualified species for a period of not less than 30 years and less than perpetuity. A qualified habitat protection agreement requires agreement with the appropriate Secretary, the Secretary of Agriculture, the Secretary of Defense, or a State to protect the habitat of a qualified species for a specified period of time.

In addition, each of the three types of qualified agreement must meet the following requirements: (1) The agreement must be consistent with any recovery plan that is applicable and that has been approved for a qualified species under section 4 of the Endangered Species Act of 1973; (2) the agreement must include a habitat management plan agreed to by the appropriate Secretary and the eligible taxpayer; and (3) the agreement must require that technical assistance with respect to the duties under the habitat management plan be provided to the taxpayer by the appropriate Secretary or an entity approved by the appropriate Secretary.

Habitat management plan

A habitat management plan means, with respect to any habitat, a plan that (1) identifies one or more qualified species to which the plan applies; (2) is designed to restore or enhance the habitat of a qualified species or reduce threats to a qualified species through the management of the habitat; (3) describes the threats to the qualified species that are intended to be reduced through the plan; (4) describes the management practices to be undertaken by the taxpayer; (5) provides a schedule of deadlines for undertaking such management practices; (6) requires monitoring of the management practices and the status of the qualified species; and (7) describes the technical assistance to be provided to the taxpayer and identifies the entity that will provide such assistance.

Qualified species

A qualified species is any species listed as an endangered species or threatened species under the Endangered Species Act of 1973 or any species for which a finding has been made under section 4(b)(3) of the Endangered Species Act of 1973 that listing under such Act may be warranted.

Taking

A taking has the meaning given to such term under the Endangered Species Act of 1973.

Appropriate Secretary

Appropriate Secretary has the meaning given to the term "Secretary" under section 3(15) of the Endangered Species Act of 1973.

EFFECTIVE DATE

The provision is effective for taxable years beginning after December 31, 2007.

C. Allow Deduction for Endangered Species Recovery Expenditures

(Sec. 4 of the bill and sec. 175 of the Code)

PRESENT LAW

Under present law, a taxpayer engaged in the business of farming may treat expenditures that are paid or incurred by him during the taxable year for the purpose of soil or water conservation in respect of land used in farming, or for the prevention or erosion of land used in farming, as expenses that are not chargeable to capital account. Such expenditures are allowed as a deduction, not to exceed 25 percent of the gross income derived from farming during the taxable year.[4] Any excess above such percentage is deductible for succeeding taxable years, not to exceed 25 percent of the gross income derived from farming during such succeeding taxable year.

REASONS FOR CHANGE

The goal of the Endangered Species Act of 1973 is to recover listed species and the ecosystems on which they depend to levels where protection under such Act is no longer necessary. Recovery is the process by which the decline of an endangered species is arrested or reversed, and threats removed or reduced so that the species' long-term survival in the wild can be ensured. Section 4(f)(1) of such Act directs the appropriate Secretary to develop and implement recovery plans for the conservation and survival of endangered and threatened species, unless the appropriate Secretary finds that such a plan will not promote the conservation of the species. To the maximum extent practicable, the recovery plan must incorporate a description of management actions to achieve the plan's goals, objective and measurable criteria for determining the removal of species from the endangered species list, and estimate the time required and cost to carry out the recovery plan. The appropriate Secretary may procure the services of appropriate private and public agencies in developing and implementing a recovery plan.

According to an April 6, 2006, General Accountability Office report entitled "Endangered Species: Time and Costs to Recover Species Are Largely Unknown," as of January 2006, the Fish and Wildlife Service and the National Marine Fisheries Service had finalized and approved 558 recovery plans covering 1,049 species, or about 82 percent of the 1,272 endangered or threatened species protected in the United States at that time. Recovery plans contain management measures that landowners can adopt on their land that will aid in the recovery of endangered or threatened species, resulting in a public benefit. Such are similar to measures undertaken for soil and water conservation, which are entitled to a tax deduction. The Committee believes that certain expenses of taxpayers made pursuant to a recovery plan under the Endangered

[4] Sec. 175.

Species Act should be treated similarly to expenditures by farmers made for soil and water conservation.

EXPLANATION OF PROVISION

The provision provides that expenditures paid or incurred by a taxpayer engaged in the business of farming for the purpose of achieving site-specific management actions pursuant to the Endangered Species Act of 1973 [5] to be treated the same as expenditures for the purpose of soil or water conservation in respect of land used in farming, or for the prevention or erosion of land used in farming, i.e., such expenditures are treated as not chargeable to capital account and are deductible subject to the limitation that the deduction may not exceed 25 percent of the farmer's gross income derived from farming during the taxable year.

EFFECTIVE DATE

The provision is effective for expenditures paid or incurred after the date of enactment.

D. Provide Exclusion for Certain Payments and Programs Relating to Fish and Wildlife

(Sec. 5 of the bill and sec. 126 of the Code)

PRESENT LAW

Under present law, gross income does not include the excludable portion of payments made to taxpayers by the Federal and State governments for a share of the cost of improvements to property under certain conservation programs.[6]

The excludable portion is the portion (or all) of a payment made under such programs that is determined by the Secretary of Agriculture to be made primarily for the purpose of conserving soil and water resources, protecting or restoring the environment, improving forests, or providing a habitat for wildlife, and is determined by the Secretary of the Treasury as not increasing substantially the annual income derived from the property. The excludable portion does not include that portion of any payment that is properly associated with an amount that is allowable as a deduction for the taxable year in which such amount is paid or incurred.

Applicable conservation programs include (1) the rural clean water program authorized by section 208(j) of the Federal Water Pollution Control Act, (2) the rural abandoned mine program authorized by section 406 of the Surface Mining Control and Reclamation Act of 1977, (3) the water bank program authorized by the Water Bank Act, (4) the emergency conservation measures program authorized by title IV of the Agricultural Credit Act of 1978, (5) the agriculture conservation program authorized by the Soil Conservation and Domestic Allotment Act, (6) the great plains conservation program authorized by section 16 of the Soil Conservation and Domestic Policy Act, (7) the resource conservation and development program authorized by the Bankhead-Jones Farm Tenant Act and by the Soil Conservation and Domestic Allotment Act,

[5] 16 U.S.C. 1533(f)(B).
[6] Sec. 126.

(8) the forestry incentives program authorized by section 4 of the Cooperative Forestry Assistance Act of 1978, (9) any small watershed program administered by the Secretary of Agriculture which is determined by the Secretary of the Treasury or his delegate to be substantially similar to the type of programs described in items (1) through (8), and (10) any program of a State, possession of the United States, a political subdivision of any of the foregoing, or the District of Columbia under which payments are made to individuals primarily for the purpose of conserving soil, protecting or restoring the environment, improving forests, or providing a habitat for wildlife.

REASONS FOR CHANGE

Currently, there are a few Federal programs aimed at encouraging landowners to protect and aid in the recovery of endangered or threatened species. Partners for Fish and Wildlife is a national voluntary cost-share program implemented by the U.S. Fish and Wildlife Service to protect, enhance, and restore important fish and wildlife habitats on private lands through partnerships with landowners. The Landowner's Incentive Program provides funding for states to staff their programs and to fund conservation work with private landowners to restore and maintain habitat for endangered, threatened, and other imperiled species. State Wildlife Grant funds are used to address species and their habitats that are identified in State Comprehensive Wildlife Conservation Plans/Strategies (also known as Wildlife Action Plans). Priority for use of these funds is on those species of greatest conservation need. The Private Stewardship Grant Program provides Federal grants on a competitive basis to individuals and groups engaged in voluntary conservation efforts on private lands that benefit Federally listed endangered or threatened species, candidate species or other at-risk species. Private landowners and groups working with private landowners are able to submit proposals directly to the U.S. Fish and Wildlife Service for funding to support these efforts. Each grant must be matched by at least 10 percent of the total project cost in either non Federal dollars or in-kind contributions.

The Committee believes that payments received by taxpayers under the Partners for Fish and Wildlife Program, the Landowner Incentive Program, the State Wildlife Grants Program, and the Private Stewardship Grants Program are similar to payments made under other government programs that are excludable from gross income under present law. Accordingly, the Committee believes it is appropriate to extend the present law exclusion to payments under these programs.

EXPLANATION OF PROVISION

The provision expands the exclusion to include the excludable portion of payments made under the Partners for Fish and Wildlife Program authorized by the Partners for Fish and Wildlife Act, the Landowner Incentive Program, the State Wildlife Grants Program, and the Private Stewardship Grants Program authorized by the Fish and Wildlife Act of 1956.

EFFECTIVE DATE

The provision is effective for payments received after the date of enactment.

E. Extend Expensing of Brownfields Remediation Costs

(Sec. 6 of the bill and sec. 198 of the Code)

PRESENT LAW

Present law allows a deduction for ordinary and necessary expenses paid or incurred in carrying on any trade or business.[7] Treasury regulations provide that the cost of incidental repairs that neither materially add to the value of property nor appreciably prolong its life, but keep it in an ordinarily efficient operating condition, may be deducted currently as a business expense. Section 263(a)(1) limits the scope of section 162 by prohibiting a current deduction for certain capital expenditures. Treasury regulations define "capital expenditures" as amounts paid or incurred to materially add to the value, or substantially prolong the useful life, of property owned by the taxpayer, or to adapt property to a new or different use. Amounts paid for repairs and maintenance do not constitute capital expenditures. The determination of whether an expense is deductible or capitalizable is based on the facts and circumstances of each case.

Taxpayers may elect to treat certain environmental remediation expenditures that would otherwise be chargeable to capital account as deductible in the year paid or incurred.[8] The deduction applies for both regular and alternative minimum tax purposes. The expenditure must be incurred in connection with the abatement or control of hazardous substances at a qualified contaminated site. In general, any expenditure for the acquisition of depreciable property used in connection with the abatement or control of hazardous substances at a qualified contaminated site does not constitute a qualified environmental remediation expenditure. However, depreciation deductions allowable for such property, which would otherwise be allocated to the site under the principles set forth in *Commissioner* v. *Idaho Power Co.*[9] and section 263A, are treated as qualified environmental remediation expenditures.

A "qualified contaminated site" (a so-called "brownfield") generally is any property that is held for use in a trade or business, for the production of income, or as inventory and is certified by the appropriate State environmental agency to be an area at or on which there has been a release (or threat of release) or disposal of a hazardous substance. Both urban and rural property may qualify. However, sites that are identified on the national priorities list under the Comprehensive Environmental Response, Compensation, and Liability Act of 1980 ("CERCLA")[10] cannot qualify as targeted areas. Hazardous substances generally are defined by reference to sections 101(14) and 102 of CERCLA, subject to additional limitations applicable to asbestos and similar substances within buildings, certain naturally occurring substances such as radon, and cer-

[7] Sec. 162.
[8] Sec. 198.
[9] 418 U.S. 1 (1974).
[10] Pub. L. No. 96–510 (1980).

tain other substances released into drinking water supplies due to deterioration through ordinary use, as well as petroleum products defined in section 4612(a)(3) of the Code.

In the case of property to which a qualified environmental remediation expenditure otherwise would have been capitalized, any deduction allowed under section 198 is treated as a depreciation deduction and the property is treated as section 1245 property. Thus, deductions for qualified environmental remediation expenditures are subject to recapture as ordinary income upon a sale or other disposition of the property. In addition, sections 280B (demolition of structures) and 468 (special rules for mining and solid waste reclamation and closing costs) do not apply to amounts that are treated as expenses under this provision.

Eligible expenditures are those paid or incurred before January 1, 2008.

The Gulf Opportunity Zone Act of 2005 [11] added section 1400N(g) to the Code, which extended for two years (through December 31, 2007) the expensing of environmental remediation expenditures paid or incurred to abate contamination at qualified contaminated sites located in the Gulf Opportunity Zone. As a result of the extension of section 198 contained in the Tax Relief and Health Care Act of 2006,[12] eligible expenditures covered under both section 1400N(g) and section 198 must be paid or incurred prior to January 1, 2008.

REASONS FOR CHANGE

The Committee believes that the expensing of brownfields remediation costs promotes the goal of environmental remediation and promotes new investment and employment opportunities by lowering the net capital cost of a development project. Therefore, the Committee believes it is appropriate to extend the present law provision permitting the expensing of these environmental remediation costs.

EXPLANATION OF PROVISION

The provision extends the present law expensing provision under section 198 for three years through December 31, 2010.

EFFECTIVE DATE

The provision is effective for expenditures paid or incurred after December 31, 2007.

F. Allowance of Section 1031 Treatment for Exchanges Involving Certain Mutual Ditch, Reservoir, or Irrigation Company Stock

(Sec. 7 of the bill and sec. 1031 of the Code)

PRESENT LAW

An exchange of property, like a sale, generally is a taxable event. However, no gain or loss is recognized if property held for productive use in a trade or business or for investment is exchanged for

[11] Pub. L. No. 109–135 (2005).
[12] Pub. L. No. 109–432 (2006).

property of a "like-kind" which is to be held for productive use in a trade or business or for investment.[13] If section 1031 applies to an exchange of properties, the basis of the property received in the exchange is equal to the basis of the property transferred, decreased by any money received by the taxpayer, and further adjusted for any gain or loss recognized on the exchange. In general, section 1031 does not apply to any exchange of stock in trade or other property held primarily for sale; stocks, bonds or notes; other securities or evidences of indebtedness or interest; interests in a partnership; certificates of trust or beneficial interests; or choses in action.[14]

REASONS FOR CHANGE

The Committee believes that section 1031 should be clarified to remove any doubt that an exchange of shares in mutual ditch, reservoir, and irrigation company stock qualifies for tax deferral treatment under section 1031. The Committee intends this clarification would be for cases in which the highest court or a statute of the State in which the company is organized recognize such shares as constituting or representing real property or an interest in real property.

EXPLANATION OF PROVISION

The provision provides that the general exclusion from section 1031 treatment for stocks shall not apply to shares in a mutual ditch, reservoir, or irrigation company, if at the time of the exchange: (1) The company is an organization described in section 501(c)(12)(A) (determined without regard to the percentage of its income that is collected from its members for the purpose of meeting losses and expenses); and (2) the shares in the company have been recognized by the highest court of the State in which such company was organized or by applicable State statute as constituting or representing real property or an interest in real property.

EFFECTIVE DATE

The provision is effective for transfers after the date of enactment.

G. MODIFICATION OF EFFECTIVE DATE OF LEASING PROVISIONS OF THE AMERICAN JOBS CREATION ACT OF 2004

(Sec. 8 of the bill and sec. 470 of the Code)

PRESENT LAW

Present law provides for the deferral of losses attributable to certain tax exempt use property, generally effective for leases entered into after March 12, 2004. The deferral provision does not apply to property located in the United States that is subject to a lease with respect to which a formal application: (1) Was submitted for approval to the Federal Transit Administration (an agency of the Department of Transportation) after June 30, 2003, and before March 13, 2004; (2) was approved by the Federal Transit Administration

[13] Sec. 1031(a)(1).
[14] Sec. 1031(a)(2).

before January 1, 2006; and (3) includes a description and the fair market value of such property (the "qualified transportation property exception").

REASONS FOR CHANGE

The Committee is aware that certain leasing transactions entered into with foreign lessees prior to March 12, 2004, are continuing to provide a tax benefit to the taxpayers who participated in such transactions. The Committee finds these transactions and their continuing tax benefit to be inappropriate.

EXPLANATION OF PROVISION

The provision changes the effective date of the loss deferral rules with respect to certain leases. Under the provision, the loss deferral rules also apply to leases entered into on or before March 12, 2004, if the lessee is a foreign person or entity. With respect to such leases, losses are deferred starting in taxable years beginning after December 31, 2006.

No inference is intended regarding the appropriate present law tax treatment of transactions entered into prior to March 12, 2004, if the lessee is not a foreign person or entity. In addition, it is intended that the provision shall not be construed as altering or supplanting the present-law tax rules providing that a taxpayer is treated as the owner of leased property only if the taxpayer acquires and retains significant and genuine attributes of an owner of the property, including the benefits and burdens of ownership. The provision also is not intended to affect the scope of any other present-law tax rules or doctrines applicable to purported leasing transactions.

EFFECTIVE DATE

The provision is effective as if included in the provisions of the American Jobs Creation Act of 2004 to which it relates.

III. BUDGET EFFECTS OF THE BILL

A. COMMITTEE ESTIMATES

In compliance with paragraph 11(a) of rule XXVI of the Standing Rules of the Senate, the following statement is made concerning the estimated budget effects of the revenue provisions of the "Habitat and Land Conservation Act of 2007" as reported.

ESTIMATED REVENUE EFFECTS OF
THE "HABITAT AND LAND CONSERVATION ACT OF 2007,"
AS REPORTED BY THE COMMITTEE ON FINANCE

Fiscal Years 2008 - 2017

[Millions of Dollars]

Provision	Effective	2008	2009	2010	2011	2012	2013	2014	2015	2016	2017	2008-12	2008-17
1. Make permanent the special rule for contributions of qualified conservation contributions	cmi tyba 12/31/07	-36	-46	-57	-69	-83	-86	-90	-94	-98	-102	-291	-761
2. Provide a tax credit for recovery and restoration of endangered species	tyba 12/31/07	-12	-75	-117	-196	-244	-257	-201	-135	-66	-33	-644	-1,335
3. Allow a deduction for endangered species recovery expenditures	epoia DOE	-14	-21	-24	-29	-35	-40	-47	-54	-63	-73	-122	-399
4. Provide an exclusion for certain payments and programs relating to fish and wildlife	pra DOE	-3	-5	-6	-6	-6	-6	-6	-6	-6	-6	-26	-55
5. Extend expensing of Brownfields remediation costs (sunset 12/31/10)	epoia 12/31/07	-227	-368	-353	-98	76	80	78	70	61	52	-971	-630
6. Allowance of section 1031 treatment for exchanges involving certain mutual ditch, reservoir, or irrigation company stock	tyba DOE	[1]	[1]	[1]	[1]	[1]	[1]	[1]	[1]	[1]	[1]	-1	-2

Provision	Effective	2008	2009	2010	2011	2012	2013	2014	2015	2016	2017	2008-12	2008-17
7. Modify the effective date for the application of the AJCA 2004 leasing (SILO) provision - apply loss limitation to leases with foreign entities regardless of when the lease was entered into	tyba 12/31/06	2,680	896	407	290	288	260	135	-239	-629	-854	4,561	3,235
NET TOTAL		**2,388**	**381**	**-150**	**-108**	**-4**	**-49**	**-131**	**-458**	**-801**	**-1,016**	**2,506**	**53**

Joint Committee on Taxation

NOTE: Details may not add to totals due to rounding. Date of enactment is assumed to be October 1, 2007.

Legend for "Effective" column:

cmi = contributions made in
DOE = date of enactment
epoia = expenditures paid or incurred after
pra = payments received after
tyba = taxable years beginning after

[1] Loss of less than $500,000.

B. Budget Authority and Tax Expenditures

Budget authority

In compliance with section 308(a)(1) of the Budget Act, the Committee states that no provisions of the bill as reported involve new or increased budget authority.

Tax expenditures

In compliance with section 308(a)(2) of the Budget Act, the Committee states that the revenue-reducing provisions of the bill involve increased tax expenditures (see revenue table in Part A., above). The revenue-increasing provisions of the bill involve reduced tax expenditures (see revenue table in part A, above).

C. Consultation With Congressional Budget Office

In accordance with section 403 of the Budget Act, the Committee advises that the Congressional Budget Office submitted the following statement on this bill:

U.S. Congress,
Congressional Budget Office,
Washington, DC, October 22, 2007.

Hon. Max Baucus,
Chairman, Committee on Finance,
U.S. Senate, Washington, DC.

Dear Mr. Chairman: The Congressional Budget Office has prepared the enclosed cost estimate for the Habitat and Land Conservation Act of 2007.

If you wish further details on this estimate, we will be pleased to provide them. The CBO staff contact is Barbara Edwards.

Sincerely,

Robert A. Sunshine
(For Peter R. Orszag, Director).

Enclosure.

S. 2223—Habitat and Land Conservation Act of 2007

The Habitat and Land Conservation Act of 2007 would provide tax relief to individuals and corporations that make charitable contributions or expenditures for conservation of endangered species and would extend the rules that allow businesses to immediately deduct remediation costs of real property that could not be reused due to environmental contaminants (brownfields sites). The bill also would accelerate the effective date for provisions of the American Jobs Creation Act of 2004 (AJCA) that provided for loss deferral rules for certain tax-exempt property involved in so-called sale-in, lease-out ("SILO") transactions.

The Joint Committee on Taxation (JCT) estimates that enacting the bill would increase revenues by $2.5 billion over the 2008–2012 period and by $53 million over the 2008–2017 period. CBO estimates that implementing the legislation would cost less than $500,000 per year over the 2008–2012 period, assuming the availability of appropriated funds.

JCT has determined that the tax provisions of the bill contain one private-sector mandate as defined in the Unfunded Mandates

Reform Act (UMRA): modification of the effective date for the provisions of AJCA regarding leasing (SILO) transactions. CBO has reviewed the non-tax provision of the bill (section 3(b)) and determined that it contains no private-sector mandates as defined in UMRA. CBO and JCT have determined that the bill contains no intergovernmental mandates.

The estimated revenue effects are summarized below.

	By fiscal year, in millions of dollars—											
	2008	2009	2010	2011	2012	2013	2014	2015	2016	2017	2008–2012	2008–2017
Estimated Revenues	2,388	381	−150	−108	−4	−49	−131	−458	−801	−1,016	2,506	53

Source: Joint Committee on Taxation.

The Habitat and Land Conservation Act of 2007 would provide income tax credits for certain costs related to habitat restoration and habitat protection easements for endangered species. It also would make permanent the provisions that expire on December 31, 2007, that reduce the limitations for deducting charitable contributions of certain conservation property. The bill also would allow farmers to immediately deduct certain capital expenditures for endangered species recovery to the same extent that they can deduct capital expenditures related to soil and water conservation. JCT estimates that these three provisions would reduce revenues by $62 million in 2008, by $1.1 billion over the 2008–2012 period, and by $2.5 billion over the 2008–2017 period.

The bill would extend for three years, to December 31, 2010, the rules that allow taxpayers to immediately deduct remediation costs for brownfields. JCT estimates that this provision would reduce revenues by $227 million in 2008, by $971 million over the 2008–2012 period, and by $630 million over the 2008–2017 period.

The bill would accelerate the effective date for provisions of AJCA that provided for loss deferral rules for certain tax-exempt property involved in SILO transactions. JCT estimates that this provision would increase revenues by $2.7 billion in 2008, by $4.6 billion over the 2008–2012 period, and by $3.2 billion over the 2008–2017 period.

The legislation also would require a five-year study by the Government Accountability Office (GAO) on the endangered species recovery and restoration credit. This study would include an evaluation of the tax credit for the restoration and enhancement of species habitat and the development of recommendations to improve effectiveness of the credit. Based on the costs of similar efforts, CBO estimates that preparing the study would cost less than $500,000 annually over the 2008–2012 period.

The CBO staff contacts for this estimate are Barbara Edwards (for revenues) and Matthew Pickford (for GAO costs). The estimate was approved by Peter H. Fontaine, Assistant Director for Budget Analysis, and G. Thomas Woodward, Assistant Director for Tax Analysis.

IV. VOTES OF THE COMMITTEE

In compliance with paragraph 7(b) of rule XXVI of the Standing Rules of the Senate, the Committee states that, with a majority and quorum present, the "Habitat and Land Conservation Act of

2007" was ordered favorably reported by a voice vote on September 21, 2007.

V. REGULATORY IMPACT AND OTHER MATTERS

A. Regulatory Impact

Pursuant to paragraph 11(b) of rule XXVI of the Standing Rules of the Senate, the Committee makes the following statement concerning the regulatory impact that might be incurred in carrying out the provisions of the bill as amended.

Impact on individuals and businesses, personal privacy and paperwork

The bill includes provisions to extend present law tax benefits, expand eligibility for other benefits, and create new benefits. The bill also includes a provision expanding the loss limitation on leases with foreign entities. These provisions generally do not impose increased regulatory burdens on individuals or businesses. Taxpayers who elect to take advantage of certain provisions of the bill will need to keep records to demonstrate that they qualify for the tax treatment provided by the bill. One provision in the bill allows taxpayers to apply for a tax credit allocation relating to habitat protection and restoration. Taxpayers receiving an allocation must enter into certain qualified agreements in order to claim the credit.

The provisions of the bill do not impact personal privacy.

B. Unfunded Mandates Statement

This information is provided in accordance with section 423 of the Unfunded Mandates Reform Act of 1995 (Pub. L. No. 104–4).

The Committee has determined that the following tax provision of the reported bill contains a Federal private sector mandate within the meaning of Public Law No. 104–4, the Unfunded Mandates Reform Act of 1995: Modifying the effective date for the application of the American Jobs Creation Act of ("AJCA") 2004 leasing ("SILO") provision—apply loss limitation to leases with foreign entities regardless of when the lease was entered into. The tax provisions of the reported bill do not impose a Federal intergovernmental mandate on State, local, or tribal governments within the meaning of Public Law No. 104–4, the Unfunded Mandates Reform Act of 1995.

The costs required to comply with the Federal private sector mandate generally is no greater than the aggregate estimated budget effects of the provision.

C. Tax Complexity Analysis

Section 4022(b) of the Internal Revenue Service Restructuring and Reform Act of 1998 (the "IRS Reform Act") requires the Joint Committee on Taxation (in consultation with the Internal Revenue Service and the Department of the Treasury) to provide a tax complexity analysis. The complexity analysis is required for all legislation reported by the Senate Committee on Finance, the House Committee on Ways and Means, or any committee of conference if the legislation includes a provision that directly or indirectly

amends the Internal Revenue Code (the "Code") and has widespread applicability to individuals or small businesses.

The staff of the Joint Committee on Taxation has determined that a complexity analysis is not required under section 4022(b) of the IRS Reform Act because the bill contains no provisions that have "widespread applicability" to individuals or small businesses.

VI. CHANGES IN EXISTING LAW MADE BY THE BILL, AS REPORTED

In the opinion of the Committee, it is necessary, in order to expedite the business of the Senate, to dispense with the requirements of paragraph 12 of rule XXVI of the Standing Rules of the Senate (relating to the showing of changes in existing law made by the bill as reported by the Committee).

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