



Legislative Fiscal Bureau

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Joint Committee on Finance

Paper #140

Working Lands Initiative - Purchase of Agricultural Conservation Easements (DATCP)

[LFB 2009-11 Budget Summary: Page 67, #4 and Page 70, #5]

CURRENT LAW

Wisconsin and federal law contain several methods and programs under which parties may enter into easements to purchase specifically identified rights for the conservation of privately held agricultural or undeveloped lands. Chapter 261, Laws of 1981, enacted Wisconsin's Uniform Conservation Easement Act (section 700.40 of the statutes), the intent of which was to establish a general policy among states for the creation and maintenance of easements. Multiple separate programs establish more specific terms under which the state may enter into conservation easements. The Knowles-Nelson Stewardship program under the Department of Natural Resources (DNR) allows for the purchase of perpetual easements by DNR for lands primarily to protect conservation values and to be open to public nature-based outdoor recreation. Administrative rules for the nonpoint source water pollution abatement program, or priority watershed program, also allow DNR to purchase easements from landowners for riparian buffers, wetland restoration, urban nonpoint source pollution prevention practices and stabilization of certain critical nonpoint source water pollution areas identified under the program.

Several federal programs under the U.S. Department of Agriculture (USDA) offer matching funds to landowners or state, local, or private nonprofit agencies that agree to cooperate on purchasing conservation easements. The federal Farm and Ranch Lands Protection Program (FRPP) provides 50% of the appraised fair market value of a conservation easement that covers eligible lands. This program is the most substantially similar federal program to the agricultural conservation easement program proposed in the bill. The Conservation Reserve Enhancement Program (CREP) allows for the state to match federal payments to owners of agricultural lands that keep lands out of production to achieve soil and water conservation

objectives. CREP agreements may be for either 15-year periods or in perpetuity. Other federal programs that offer either finite or perpetual easements include the Grassland Reserve Program (GRP) and the Wetlands Reserve Program (WRP).

Several Wisconsin municipalities have enacted their own programs for purchasing conservation easements. As of 2007, approximately 246,000 acres in Wisconsin were under conservation easements in federal, state, or local programs.

GOVERNOR

Create a purchase of agricultural conservation easements (PACE) program in the Department of Agriculture, Trade and Consumer Protection (DATCP). Cooperating entities, which would be local governments or nonprofit conservation organizations (NCOs), would purchase easements from willing landowners, and DATCP would reimburse both 50% of the fair market value of the land and all reasonable transaction costs. Easements would prohibit the land covered from being developed for any purpose other than agricultural use. Contracts for easements may contain other conditions limiting the non-agricultural use of the land or requiring certain agricultural practices on the land. The holder of the property would continue to pay property taxes on the land. Easements would continue in perpetuity, except if terminated by a court after a finding that the land can no longer fulfill its original purpose due to unforeseen circumstances.

Authorize \$12 million in general obligation bonding authority for PACE, and delete \$12 million of DATCP's \$40 million general obligation bonding authority for the state's participation in the federal Conservation Reserve Enhancement Program (CREP). Create a sum-sufficient GPR appropriation for debt service on general obligation bonds, and create a program revenue, continuing appropriation for the receipt of gifts and grants, including court-ordered payments for terminated easements. Additionally, create the following sum-certain appropriations from the segregated working lands fund: (a) costs of purchasing agricultural conservation easements; and (b) debt service payments for bonds issued to fund purchase of agricultural conservation easements.

DISCUSSION POINTS

1. This program would adopt a recommendation of the Working Lands Group, which was convened by the Secretary of Agriculture, Trade and Consumer Protection. The Working Lands Group consisted of a variety of stakeholders and groups, including agricultural, environmental, builders, real estate, business, and local government. One of the recommendations of the group included creating a program for the purchase of perpetual agricultural conservation easements. The group also recommended changes to the farmland preservation program, which are addressed in a separate paper.

2. The bill would authorize DATCP to create an annual competitive application

process for grants for the purchase of easements. DATCP would specify in an annual solicitation for grants the amount of funding available for easement purchase, subject to the bonding authority available at that time. DATCP has not estimated the annual number of easements into which it would enter in each year.

3. The administration intends for the PACE program to complement the changes proposed to the farmland preservation program in Chapter 91 of the statutes. Together, these recommendations form the Working Lands Initiative. Agricultural conservation easements are intended to be a more permanent designation of land for future agricultural use, whereas policy instruments proposed in Ch. 91, including farmland preservation plans, farmland preservation ordinances, farmland preservation agreements and agricultural enterprise areas, typically are not permanent.

4. Agricultural conservation easements would be contingent upon the willingness of owners of agricultural lands to enter into the agreements. It could be questioned as to whether there is sufficient demand for this sort of agreement. As of March 1, approximately 16% of the easements in CREP, or about 6,300 acres out of 40,300, are for perpetual easements, while 84% are in 15-year easements. This may indicate an unwillingness of agricultural land owners either to permanently remove lands from agricultural production, or from future sale for development.

5. However, it could also be argued that CREP and PACE have different purposes, and farmers who choose not to remove lands from agricultural production and place them into CREP may well be interested in enrolling their lands in perpetual agricultural conservation easements. Further, the federal Farm and Ranch Lands Protection Program (FRPP), which has a program structure similar to PACE, has had demand for easements that have exceeded supply. From 1996 through 2008, FRPP has awarded approximately \$15.8 million to 89 properties covering 13,400 acres, while 172 farms have requested \$32.8 million in funding for 31,100 acres.

6. It could be argued that PACE would duplicate a similar federal program operating in the state and may, therefore, be unnecessary. However, DATCP officials report agricultural conservation easements are intended to offer different protection for certain agricultural lands beyond those in current law or those under Ch. 91 as proposed in the bill. A state program may also serve to meet unmet demand for FRPP funding for Wisconsin, which is limited. For federal fiscal year 2009, \$2,008,800 is available in federal matching funds for easement purchases.

Approval of Easements and Easement Eligibility

7. The criteria DATCP would be required to consider before approving an easement would be: (a) the value of the proposed easement in preserving or enhancing agricultural production capacity; (b) the importance of the easement in protecting or enhancing the waters of the state or other public assets; (c) the extent to which the proposed agricultural conservation easement would conserve important or unique agricultural resources, such as prime soils and soil resources that are of statewide importance or are unique; (d) the extent to which the proposed agricultural conservation easement would be consistent with local land use plans and zoning ordinances,

including any certified farmland preservation plans and zoning ordinances under Ch. 91; (e) the extent to which the proposed agricultural conservation easement would enhance an agricultural enterprise area; (f) the availability, practicality, and effectiveness of other methods to preserve the land that would be under the easement; (g) the proximity of the land that would be under the easement to other land protected for agricultural use or conservation use, and the extent to which the easement would enhance that protection; (h) the likely cost-effectiveness of the proposed easement in preserving land for agricultural use; (i) the likelihood that the land under consideration would be converted to non-agricultural use if the land is not under an easement; and (j) the apparent willingness of each landowner to convey the proposed easement.

8. DATCP reports that these criteria will generally function to limit easement purchases to certain types of lands. For example, considerations of cost-effectiveness suggest that easements would be unsuitable for lands that are prohibitively expensive or for lands that are of low agricultural value. Further, lands may also be less likely to earn strong consideration for an easement if they were already under some sort of designation for agricultural preservation, such as a perpetual easement under CREP, or if they were under little or no development pressure.

9. Although the bill would establish the considerations listed above for easement approval, the bill does not establish specific criteria for lands that are eligible to come under an easement, as the FRPP does. For example, the FRPP requires that lands be cropland, rangeland, grassland, pasture or forest and part of an agricultural operation. Lands must consist of at least 50% prime, unique or otherwise statewide or locally important soil. FRPP also allows easements for lands with historic or archaeological significance. It could be argued that the bill limits easements to land under agricultural use as defined in the bill; because any easement would prohibit land from being developed for non-agricultural use, it is implied that land must be undeveloped or under agricultural use when the easement is created. DATCP also reports that most soils in Wisconsin would meet a requirement of 50% prime, unique, or statewide or locally important.

10. DATCP reports that these FRPP provisions would be required of any easement proposal from a cooperating entity that would also utilize federal funds to help purchase an easement. (Federal involvement in easement purchases is discussed later in greater detail.) However, the Committee may wish to consider eligibility criteria for landowners and lands proposed for an easement. Specific criteria could give additional guidance to DATCP in its considerations during the competitive application process proposed in the bill. Also, establishing specific criteria for easements could provide applicants with greater information on their prospects for funding. Specific eligibility criteria could, however, limit DATCP's discretion in determining which easements represent the best use of state resources.

11. The Committee may wish to consider criteria similar to those set in the FRPP, including: (a) lands proposed for easement must consist of at least 50% prime, unique or statewide or locally important soil (Alternative B1); and (b) lands must be in agricultural use or open space, and part of an agricultural operation at the time of application (Alternative B2).

Cooperating Entities

12. As proposed, the bill requires that cooperating entities be a city, village, town, county or non-profit conservation organization. The bill also specifies the responsibilities of a cooperating entity and the process it would follow in entering into an easement. However, the criteria with which DATCP would evaluate a proposed easement do not specify that DATCP consider the likely effectiveness of a cooperating entity in maintaining and enforcing an easement. Under the FRPP, the USDA gives priority to organizations with experience in managing and enforcing conservation easements, but does not prohibit the participation of entities with limited experience. The Committee may wish to consider such a requirement for cooperating entities (Alternative C1). It could be argued that such a requirement would provide a greater assurance to the state that the easement, as a state asset, would be properly maintained and managed so as to retain its value. However, it may be that cooperating entities with limited experience could manage an easement for the benefit of the state, and that such a requirement would discourage participation among newer cooperating entities, or exclude them from the program entirely.

Federal Involvement in Easements

13. DATCP intends for PACE funding to leverage federal funds, such as those available in FRPP. DATCP reports that in these cases, state funding could be allocated to cooperating entities to provide these entities with additional means to match available federal funds. Such leveraging would lower contributions required of cooperating entities under PACE, and may also allow state funds to assist in the purchase of more easements than may otherwise be realized with state funding alone. Any easements purchased jointly with federal funds generally would have to meet both the terms required under the PACE program and the federal program (such as FRPP).

Planning Consistency

14. Under the bill, it is possible that cooperating entities could purchase agricultural conservation easements to cover land not identified in a county farmland preservation plan, not identified in a farmland preservation zoning ordinance, and not in an agricultural enterprise area. The bill contains no restrictions on where an agricultural conservation easement may occur. Three criteria on which easement applications are evaluated, however, specify that the Department must consider: (a) the easement's compatibility with local plans and zoning ordinances, including those that may be certified under Ch. 91 as proposed in the bill; (b) whether an easement enhances an agricultural enterprise area; and (c) the proximity of the proposed easement to other land protected for agricultural or conservation use, and the extent to which the easement would enhance the protection. Under these criteria, DATCP contends that agricultural conservation easements are intended not to subvert local land-use policy, but to strengthen the areas already designated for preservation. DATCP reports it would prefer easements to be within or contiguous to other areas designated for agricultural preservation.

15. The Committee could consider a requirement that DATCP not enter into an agricultural conservation easement if the easement is contrary to the stated land-use policy of a

jurisdiction in which the easement would be located (Alternative D1). This would restrict easements from being created for lands identified by local governments as desirable for future development. One could argue such a provision would prevent the disruption of local land-use plans created by a local government through public deliberation. Conversely, it could be argued that such a requirement could limit easements sought by landowners whose lands are under development pressure and who are strongly committed to keeping their lands in agricultural use. This may result in future conversion of land from agricultural use, contrary to the landowner's wishes.

Transaction Costs

16. The cost-sharing provisions proposed for the PACE program are inconsistent with some provisions in similar easement purchasing programs. The stewardship program generally allows the state to pay 50% of acquisition costs, which includes both the fair market value of the land rights being purchased and reasonable transaction costs as set by administrative rule. The priority watershed program allows DNR to share in the purchase of easements at a rate of 70% of acquisition costs for most rural easements and a rate of 50% of acquisition costs for easements to support structural urban best management practices. Acquisition costs in the priority watershed program are defined as the sum of the fair market value and reasonable transaction costs, including appraisals, surveys, title evidence and recording fees. The PACE program would allow for the Department to pay for 50% of the fair market value of the easement, but the bill would authorize DATCP to pay 100% of reasonable transaction costs related to purchase of the easement. DATCP contends covering all transaction costs is warranted because the easements would become state assets upon their purchase, and that the state should bear the transaction costs of obtaining such assets. However, because the statutes specify both DATCP and the cooperating entity are holders of the easement, the easement would also be an asset of the cooperating entity. Further, it is likely the local government or NCO would have the primary role in overseeing the terms of the easement.

17. Transaction costs for PACE under the bill would include out-of-pocket expenses incurred in connection with the acquisition, processing, recording and documentation of an agricultural conservation easement, including out-of-pocket expenses for land surveys, land descriptions, real estate appraisals, title verification, preparation of legal documents, reconciliation of conflicting property interests, documentation of existing land uses and closing costs.

18. Federal programs have a variety of cost-sharing provisions for transaction costs. The FRPP pays no transaction costs and requires cooperating entities to pay all transaction costs. However, the USDA may pay all transaction costs under the WRP and GRP.

19. Gathering Waters Conservancy, a non-profit organization that tracks conservation easements in Wisconsin, estimates that typical transaction costs may be from \$5,000 to \$14,000 for a typical easement. Expenses that cooperating entities would be likely to incur are listed in the following table, as well as a low and a high estimate of what the costs may typically be.

<u>Expense</u>	<u>Low Estimate</u>	<u>High Estimate</u>
Appraisal	\$1,500	\$5,000
Land Survey	2,100	5,000
Title Insurance	750	1,000
Title Search	150	500
Attorney Fees	0	1,000*
Closing Fees	200	300
Recording Fees	50	50
Documentation of Existing Uses	100	1,000
Environmental Hazards Assessment	<u>150</u>	<u>150</u>
Total	\$5,000	\$14,000

* May be substantially higher if ownership interest disputes occur.

20. It should be noted that many of these costs could be mitigated by being performed in-house or by the cooperating entity securing pro bono services. For example, the attorney services expense is listed above as a zero cost under a low estimate, as Gathering Waters Conservancy reports many cooperating entities secure pro bono services. However, DATCP also reports that some transaction costs may increase with the length of the transaction. For example, DATCP reports it would be in the state's interest to require a supplemental title search for easement applications that take several months or longer to close. This would help ensure no unknown liens or other conflicts arose on the property.

21. Transaction costs could represent the equivalent of several acres of eased land. It could be argued that DATCP may not be able to purchase as much acreage in easements if it is required to reimburse all transaction costs, and that acquiring additional easements may represent a better use of state resources. Further, requiring a cooperating entity to cover all transaction costs, or a substantial portion of transaction costs, would establish an incentive to contain those costs. However, it could also be argued that because cooperating entities are local governments or non-profit organizations, these organizations may be less able to bear transaction costs, and that requiring these entities to incur a portion of transaction costs may discourage participation in the program. DATCP also contends that it would be able to restrict its payment to certain transaction costs under the proposed structure of the program. Specifically, the bill would require the Department to pay only reasonable transaction costs, and the program would require a contract between DATCP and the cooperating entity that would specify the responsibilities of each in purchasing the easement. DATCP reports it would use this contract to specify which transaction costs it would agree to pay.

22. If the Committee wished to allow payment of all transaction costs, it could approve the Governor's recommendation. The Committee may alternatively wish to consider specifying a percentage of transaction costs up to which DATCP will pay, such as 50% (Alternative E1) or 70% (Alternative E2). The 50% rate would be consistent with the stewardship provision, while 70% would be consistent with certain provisions of the priority watershed program for rural easements. The Committee could also consider making transaction costs ineligible for any state cost-sharing

(Alternative E3).

23. The Committee may wish to specify, in greater detail, the transaction costs that DATCP would be able to reimburse, including: (a) out-of-pocket expenses incurred in connection with the acquisition, processing, recording and documentation of an agricultural conservation easement; and (b) out-of-pocket expenses for land surveys, land descriptions, real estate appraisals, title verification, documentation of existing land uses, and closing costs, but not including a cooperating entity's costs of staffing, overhead or operations (Alternative E4). These costs would generally be consistent with the Governor's recommendation, although it would delete costs related to the reconciliation of conflicting property interests and the preparation of legal documents, which could involve potentially substantial attorney fees. Most attorney fees are ineligible for reimbursement under the nonpoint and stewardship programs.

24. In addition, the Committee could specify certain transaction costs that would not be eligible for reimbursement. These ineligible costs could include attorney fees, environmental clean-up costs, brokerage fees, real estate transfer taxes, or costs incurred by a cooperating entity for staffing, overhead or operations (Alternative E5). These provisions would generally be consistent with the DNR requirements for eligible transaction costs under the stewardship and nonpoint source water pollution abatement programs.

Cost-Sharing Provisions

25. The PACE proposal is structured to allow for donations of land or moneys for the purchase of easements. If land is acquired for less than full market value, DATCP may still pay up to half of the fair market value under the bill. DATCP reports this is intended to keep from creating a disincentive for landowners to donate lands. This provision would result in the cooperating entity contributing a lower share of the easement cost, and potentially having its entire share of the fair market value of the easement donated. This may encourage participation by cooperating entities, as nonprofit organizations and local governments cooperating in easement purchases may have a limited ability to raise funds for certain purchases. This provision is generally consistent with local grants under the stewardship program.

26. Provisions of the FRPP authorize USDA to pay up to 50% of the appraised fair market value of the conservation easement. Cooperating entities pay the balance of the purchase price, but their contribution must be at least 25% of the purchase price of the easement. Landowners may donate any portion of the value of the land, which could result in USDA paying less than 50% of the appraised fair market value of an easement under circumstances where a landowner donates a substantial portion (generally one-third or more) of the fair market value of the easement.

27. The PACE proposal does not include provisions for a minimum share payable by a cooperating entity. This would mean DATCP would not share in cost savings in most instances of landowner donations, unless the donation exceeded 50% of the fair market value. It could also be argued requiring a cash match from a cooperating entity helps ensure the cooperating entity's continued involvement in enforcing the terms of the easement, as opposed to a circumstance in

which an entity has little or no tangible investment in the land eased. Further, it could be argued that the state should share in the reduced cost of an easement, as USDA does under FRPP for cases in which a landowner conveys an easement with a substantial donation. However, it may be that requiring a minimum payment from a cooperating entity, even in the event that a landowner donates half the fair market value of an easement, discourages the entity's participation in PACE. It may also discourage landowner donations, as landowners may wish to assist only a specific local government or NCO.

28. If the state realized cost savings on the basis of large donations, the state would be able to use available funding to purchase additional acreage over the life of the PACE program. This may offer a greater return on state resources. It should be noted that DATCP may be allowed under the language of the bill to pay less than 50% of fair market value, as the bill states DATCP "may pay...an amount that does not exceed" the sum of 50% of the fair market value and the reasonable transaction costs. Without specific guidelines as to lowering its 50% cost-share, DATCP may have to promulgate rules to ensure fair applicability of cost-sharing in cases of landowner donations.

29. The Committee could consider requiring a 25% match of the cooperating entity, with DATCP funding up to 50% of the easement's fair market value (Alternative F1). This would allow DATCP to begin sharing in cost savings with lower amounts donated by landowners.

Payment Limits

30. The FRPP, as implemented by the USDA in Wisconsin, contains provisions under which the federal government pays no more than \$4,000 per acre, although lands appraised at more than \$8,000 per acre are eligible for easements up to the \$4,000 per-acre limit. This provision is intended to limit FRPP expenditures such that program funding is not overly committed to particular properties with very high land values.

31. The PACE structure proposed in the bill would not have a specific per-acre limit on DATCP's share of an easement's purchase price. DATCP officials report that the considerations relating to cost-effectiveness of an easement in preserving agricultural use of farmland would generally preclude those lands with prohibitively high appraised fair market values that would result in an expensive easement.

32. To ensure that funds would not be committed to a small number of properties with high appraised land values, the Committee could consider establishing per-acre caps on the amount DATCP could share in an easement. The Committee may wish to consider a cap of \$4,000 per acre as under the FRPP (Alternative G1). However, it could be argued that a finite dollar amount may lower DATCP's share of an easement over time as land values increase. The Committee could consider a provision that would cap DATCP's per-acre expenditure at 90 percent of the value of all agricultural land sold in Wisconsin (Alternative G2). An estimate of annual agricultural land value could be the average price of all agricultural land sold in Wisconsin as reported by the Wisconsin Agricultural Statistics Service. For 2007, the most recent year available, the average price of all agricultural land sold in Wisconsin was \$4,365, 90% of which would be \$3,929. This would index

DATCP's per-acre cost to approximately \$4,000 in the 2009-11 biennium and allow for DATCP's share of an easement purchase to increase as land values increase, but also limit the potential for expending a disproportionate amount of the program's funding on a small number of high-value properties.

33. The Committee could also consider requiring a passive review of projects that meet or exceed certain costs. This would allow the Committee to review information on certain particularly large purchases or those with a high per-acre cost. The PACE program would represent a considerable commitment of state funds with \$12 million in general obligation bonds authorized under the bill. Total state debt service payments (principal repayment and interest) would be approximately \$19 million over a period of 20 or more years. Under a passive review procedure, the proposal would be approved after 14 working days, unless the co-chairs of the Committee decided to schedule a meeting to consider the proposal. The Committee could consider requiring a passive review for PACE purchases with a state cost exceeding \$750,000, which is the expenditure level at which a passive review is required for stewardship purchases and grants (Alternative G3a). Due to the PACE program being a vehicle for purchases of easements, which generally have a lower cost than outright land purchases, the Committee could also consider a lower expenditure level of \$500,000 (Alternative G3b).

Appraisal Provisions

34. The PACE program proposal differs from other easement programs with respect to the appraisal process. As proposed in the bill, the PACE program would require the cooperating entity, either a local unit of government or an NCO, to submit one professional appraisal to DATCP once the Department has given preliminary approval to an easement. The stewardship requirements on appraisals generally require that the cooperating entity pay for one appraisal and that the DNR independently obtain a second appraisal. 2007 Act 20 increased the requirement of a second appraisal for land whose fair market value is estimated by DNR to be more than \$350,000 (\$250,000 previously).

35. Under the PACE program as proposed, requiring only one appraisal may not allow for the most accurate information on the value of the easement. This could result in DATCP paying above-market amounts for easements, or landowners being less than fully compensated for an easement. The bill also would not specify how the appraisal to be submitted to DATCP is commissioned.

36. Various issues surrounding easements were analyzed in a 2000 Legislative Audit Bureau evaluation of the stewardship program. The LAB reviewed 35 acquisitions that had two appraisals conducted. Of these 35 properties, appraisers agreed on the fair market value twice, and the median percentage difference between appraisals for these properties was approximately 15%. The LAB noted that the DNR and Department of Revenue agreed that two professional appraisers could arrive at different but legitimate estimates of a given property's fair market value. The LAB also noted that appraisals commissioned by a prospective seller tend to undermine the independence of the appraisal process.

37. In considering the LAB findings, it is important to note that easements, which convey only certain rights to land, may be more difficult to appraise than outright land sales. Thus, one could argue that a diversity of opinion between professional appraisers may be even more informative to the parties pursuing an easement. This may be particularly so from the state's perspective if DATCP were to rely on appraisals commissioned by prospective sellers.

38. Requiring a second appraisal may itself increase the PACE program's administrative costs to DATCP. The bill would authorize real estate appraisals as an eligible transaction cost, which the bill specifies would be reimbursed by DATCP at 100%. The Department would, therefore, pay for two or any subsequent appraisals, if this provision would be adopted without change to the reimbursement rates on transaction costs.

39. If the Committee wishes to require a second appraisal, it could approve the provision as recommended by the Governor, but also require that DATCP commission an appraisal of the property under consideration (Alternative H1). Additionally, if the Committee wished to set a threshold at which a second appraisal would be required, it could establish a level of \$350,000 as exists in the stewardship program (Alternative H2). If this requirement were to apply as it does in the stewardship program, a second appraisal would be discretionary if DATCP estimated the value of the land to be at or below this level.

40. The Committee could also specify that no appraisals would be allowed if commissioned by the prospective seller (Alternative H3).

Termination of Easements

41. Under the bill, easements would be required to have a clause allowing a court to terminate an agricultural conservation easement. Termination would occur if easements are no longer able to fulfill their purpose due to unforeseen circumstances, and a court would have the authority to order a property owner to pay compensation to easement holders, including the state, under terms deemed appropriate by the court.

42. Under current law, the uniform conservation easement act specifies that any action affecting an easement may be brought by: (a) the owner of the property eased; (b) the holder of the easement; (c) a person with a third-party enforcement right; and (d) any other person authorized by law. The act also specifies that a court retains the power to modify or terminate an easement in accordance with principles of law. Further, the holder of an easement may modify the easement on terms agreeable to a landowner. Landowners may also buy back rights conveyed in an easement, which effectively extinguishes the easement. Under the PACE program, this process would help ensure the state received fair value for the easement.

43. Although the bill would allow a court to order payment of compensation under terms deemed appropriate by the court, it would specify that the court only be required find that unforeseen circumstances prohibit the easement from fulfilling its purpose. The bill does not include specific provisions allowing for easement holders to reclaim funds if a landowner, for example,

intentionally impairs the land's future use in agriculture or removes the land from agricultural use. It could be argued that absent these provisions, there are insufficient means for the state and cooperating entities to be made whole for any intentional changes in land use, as a court could order no compensation under its discretion. As current law addresses conditions under which easements may be bought, sold, transferred or modified, the provision could be deleted (Alternative II).

44. Alternatively, the Committee could consider requiring a landowner to repay the easement holders if a court finds the landowner intentionally changed the use of the land. If the Committee wished to create such a provision, it could specify one of the following: (a) require that a landowner repay each easement holder, in the proportion in which each holder paid for the easement, the actual amount received at the time of purchase, plus a rate of interest of 9.3%, which exists under current law for the farmland preservation program (Alternative I2); (b) require that a landowner repay each easement holder, in the proportion in which each holder paid for the easement, the fair market value of the land that is no longer able to fulfill its original purpose, with the fair market value determined as of the date the land is determined by the court to be no longer able to serve its original purpose (Alternative I3); or (c) require that a landowner repay each easement holder, in the proportion in which each holder paid for the easement, three times the highest value category of tillable cropland in the city, village or town in which the easement or portion thereof is located (Alternative I4). The first alternative would be generally consistent with rollback taxes required under current law for termination of farmland preservation agreements or changes to exclusive agricultural zones under Ch. 91 of the statutes. The second alternative would be a variation on a rollback tax, and it would account for changes over time in the market value of land under an easement. The third alternative would make compensation for violation of an easement consistent with the Governor's proposal under the bill for conversion fees payable for termination of a farmland preservation agreement or changes in farmland preservation zoning ordinances.

45. The Committee could consider depositing court-ordered payments in: (a) the working lands fund as proposed under the bill (Alternative I5a); (b) the general fund (Alternative I5b); or (c) both funds on a 50-50 basis (Alternative I5c). Specifying the working lands fund as the recipient fund would allow the Department to use monies received to pay for additional agricultural conservation easements, pay for debt service payments on bonds issued for agricultural conservation easements, or make other appropriations from the working lands fund. It could also be argued that this would in effect refund the Department for its costs to enter into the easement found to be violated, as the bill proposes to purchase agricultural conservation easements with both annual working lands SEG appropriations and bonds supported by GPR and working lands SEG. Depositing repayments in the general fund would have a similar effect for the portion of the agricultural conservation easements purchased with GPR-supported bond proceeds.

Program Funding

46. The bill would provide \$12 million in bonding authority currently allocated to CREP. The state has authorized \$40 million in state funding for CREP to meet a 20% match required for up to \$200 million in federal funding. The administration intends for this shift in

bonding authority to fund the PACE program while limiting the state's commitment to further debt service for bonds issued under a new program. The bill also would authorize the purchase of easements under two other appropriations, one of which is an annual appropriation funded by the segregated working lands fund and another which is a program revenue continuing appropriation for gifts and grants received for the purchase of easements. The bill provides no expenditure authority for these appropriations in the 2009-11 biennium.

47. States with programs for the purchase of agricultural conservation easements use varied funding sources, including: (a) budget appropriations; (b) general obligation bonds; (c) taxes, including those on property, sales and transfers of real estate; (d) penalties and fees for changes in agricultural land use; and (e) fees for filing or recording documents such as deeds. Wisconsin's easement-purchase programs primarily use a combination of budget appropriations and general obligation bonding. Debt service on bonds is generally paid with GPR and SEG monies. The bill would also appropriate GPR and working lands fund SEG for debt service on bonds issued, as well as create an annual appropriation from the working lands fund that could be used for the purchase of agricultural conservation easements. No funds are appropriated for 2009-11. Due to the start-up time required for the program, it is unlikely significant bond issues (and associated debt service) would occur before 2011.

48. DATCP officials report that \$28 million in CREP bonding authority would not present a short-term risk of the state running out of funds for its required 20% match under the state's agreement with the USDA. CREP is currently authorized through 2012, and Wisconsin's agreement with the USDA, which was renewed in December, 2007, will exist through 2012. Congress may extend CREP beyond 2012 in future legislation. Wisconsin's agreement is limited to 100,000 enrolled acres, and DATCP officials estimate that based on current payments and acreage enrolled, \$28 million in bonding authority will very likely cover all future state commitments in CREP up to that maximum acreage currently specified.

49. Land values that DATCP has used to estimate future CREP commitments could change. This means that state commitments could, potentially, be greater than \$28 million, although it is highly unlikely that CREP participation would exceed funding or acreage limits in the foreseeable future, given recent enrollment activity. CREP participation over the life of the program, which began in 2001-02, has enrolled approximately 40,000 acres with state payments of \$11.6 million as of March 31, 2009. Since 2005-06, the state's annual CREP payments have been between \$585,000 and \$743,400.

50. If the Committee wished to allocate CREP bonding authority for the PACE program, it could consider adopting the Governor's recommended transfer of \$12 million in bonding authority (Alternative A1). Also, the Committee may wish to reserve the right to transfer additional bonding authority between the programs. This may be desirable in the event that CREP enrollment remains below the state's maximum commitments and landowners demonstrate greater demand for PACE than can be met with the initial bonding authorization. Conversely, if CREP enrollments accelerated substantially and PACE demanded lagged, bonding could be restored to CREP. The Committee could consider adopting the Governor's recommended bonding authorization, but also

specify that the programs jointly are authorized \$40 million, with \$28 million authorized for CREP and \$12 million authorized for PACE. Further, the Committee could retain authority to transfer bonding authority between programs pursuant to a request by DATCP and DOA under s. 13.10 of the statutes (Alternative A2).

51. The Committee could consider creating a lower bonding authority for PACE in addition to granting CREP a lower bonding authority. The Committee could consider deleting \$6 million in bonding authority for PACE (Alternative A3).

52. It is difficult to estimate how many acres could be eased with \$12 million in bonding authority. DATCP officials expect the average per-acre cost of easements to be similar to costs under FRPP, which are \$2,356 per acre. Using this cost assumption, DATCP would pay approximately \$1,178 per acre under a 50% match as specified in the bill, in addition to transaction costs.

53. Lands under greater development pressure may have higher easement costs. For example, the Wisconsin Agricultural Statistics Service reports that for 2007, the last year for which statistics are available, agricultural lands sold for an average of \$4,365/acre on a statewide basis. Per-acre values ranged from \$80,000 in Milwaukee County to \$1,000/acre in Forest County, with Washington, Ozaukee, Waukesha, Kenosha, Racine, Walworth and Dane counties all reporting average land sale values over \$10,000/acre. The median per-acre sale value by county was \$3,264. It should be noted that these amounts reflect outright lands sales, which differ from easements. Easements transfer specific rights associated with lands, such as development restrictions or allowable agricultural practices, but the landowner retains possession of the land for any remaining uses allowed under terms of the easement.

54. The following table shows one estimate of how many acres could be covered under PACE easements with \$12 million in bonding authority. It uses the FRPP per-acre cost average noted above. It also assumes 151 acres in an average easement, which is the average FRPP easement size in Wisconsin. The table uses a midpoint of \$9,500 within the range of transaction costs discussed above. Actual costs and parcel sizes would likely vary substantially from project to project.

Average Per-Acre <u>Cost</u>	Average Transaction <u>Costs</u>	Average Total <u>Easement Cost</u>	Total <u>Easements</u>	Acres <u>Eased</u>
\$1,178	\$9,500	\$187,400	64	9,664

55. DATCP reports it has not made any determinations of how rapidly it would use bond authority to purchase easements. DATCP officials report several factors would be considered before the Department determined an amount of bond authority to be allocated in 2009-10 and 2010-11: (a) the advice of the advisory council that would be created under the bill; (b) the availability of federal FRPP funds that could be leveraged with PACE funding; and (c) the development of agricultural enterprise areas, which DATCP indicates may be anchored by certain

properties in the areas pursuing perpetual easements under PACE. Given these considerations, it is likely the Department would commit significantly less than the full bonding authorization in 2009-11.

56. However, bond funding authorized under the bill would likely be insufficient for the PACE program in the long term. It could be argued that one purpose of the PACE program is to ensure the continued agricultural use of those lands with the greatest potential agricultural productivity that are currently, or soon will come, under substantial development pressures. Under this assumption, DATCP may enter into some easements with higher-than-average fair market values to cover important farmlands, aside from lands that would have prohibitively high appraised values. Additionally, it could be argued that insufficient funding sends a weak signal to prospective participants and could discourage participation in the program by cooperating entities. For example, the stewardship program has typically been authorized bonding levels allocated over a 10-year period. Therefore, the Committee may wish to consider additional bond funding such as an amount of \$18 million to meet demand for a longer period than might happen under the bill (Alternative A4). Increased funding may provide a strong policy signal to prospective cooperating entities of the state commitment to the program, and could encourage participation in PACE.

57. The Governor's recommended bond authority or a lower amount would give the Legislature greater oversight as to how funds are distributed in PACE, as additional bonding requests would be subject to legislative approval on a more frequent basis. A limited amount of funding could also encourage DATCP to be more selective of lands for which it enters into easements. Based on the selection criteria proposed in the bill, a careful selection process could result in the recording of easements for lands that are most valuable agriculturally but most vulnerable to diversion to other uses.

ALTERNATIVES

A. Authorize Program and Funding

1. Approve the Governor's recommendation to create a PACE program and delete \$12 million in CREP bonding authority and provide \$12 million in PACE bonding authority.

2. Adopt the PACE program. Specify that the state may contract public debt in an amount not to exceed \$28 million for the CREP program and not to exceed \$12 million for the PACE program. Specify that bonding authority may be transferred between the programs pursuant to a request under s. 13.10 of the statutes, but that total public debt for both programs shall not be contracted in an amount exceeding \$40 million.

3. Adopt the PACE program, but delete \$6 million in PACE bonding authority.

ALT A3	Change to Bill Funding
BR	-\$6,000,000

4. Adopt the PACE program, but provide an additional \$6 million in PACE bonding authority.

ALT A4	Change to Bill Funding
BR	\$6,000,000

5. Delete provision and the related program authorization. (This would restore \$12 million in CREP bonding authority, and delete \$12 million in PACE bonding authority.)

Make one or more of the following changes to the PACE program:

B. Approval of Easements and Easement Eligibility

Specify that DATCP may enter into an easement under any or all of the following conditions:

1. Lands proposed for easement must consist of at least 50% prime, unique or statewide or locally important soil;
2. Lands must be in agricultural use or open space, and part of an agricultural operation at the time of application;

C. Cooperating Entities

1. Specify that DATCP consider the likely effectiveness of a cooperating entity in maintaining and enforcing an easement.

D. Planning Consistency

1. Specify that DATCP not enter into an agricultural conservation easement if the easement is contrary to the stated land-use policy of a jurisdiction in which the easement would be located.

E. Transaction Costs

1. Specify that DATCP pay no more than 50% of transaction costs of an easement.
2. Specify that DATCP pay no more than 70% of transaction costs of an easement.
3. Exclude transaction costs from eligibility for state cost-sharing.
4. In addition to E1 or E2, specify the following transaction costs that DATCP would be authorized to reimburse: (a) out-of-pocket expenses incurred in connection with the acquisition,

processing, recording and documentation of an agricultural conservation easement; and (b) out-of-pocket expenses for land surveys, land descriptions, real estate appraisals, title verification, documentation of existing land uses, and closing costs, but not including a cooperating entity's costs of staffing, overhead or operations.

5. In addition to E1, E2 or E4, specify transaction costs not eligible for reimbursement include attorney fees, environmental clean up costs, brokerage fees, real estate transfer taxes, and costs incurred by a cooperating entity for staffing, overhead or operations.

F. Cost-Sharing Provisions

1. Require a cooperating entity to contribute at least a 25% match of the purchase price of the easement, with DATCP funding up to 50% of the easement's fair market value.

G. Payment Limits

1. In addition to cost-sharing provisions specified, specify that DATCP may pay as its share of an easement no more than \$4,000 per acre.

2. In addition to cost-sharing provisions specified, specify that DATCP may pay as its share of an easement no more than 90% of the average value of all farmland sold in Wisconsin as determined by the Wisconsin Agricultural Statistics Service in the most recent year that statistics are available.

3. In addition to G1 or G2, require that DATCP submit purchases of more than the following amounts to the Joint Committee on Finance under a 14-day passive review process:

- a. \$750,000; or
- b. \$500,000.

H. Appraisals

1. In addition to requirements recommended by the Governor, require DATCP to commission a second professional appraisal of the property for which an easement application has been received.

2. In addition to H1, specify that a second appraisal is not required for easements estimated to have a fair market value of \$350,000 or less.

3. In addition to H1 or H2, specify that an appraisal may not be considered if commissioned by the prospective seller.

I. Termination of Easements

1. Delete the provision that would authorize a court to terminate an agricultural conservation easement and order the property owner to pay compensation to holders of the

agricultural conservation easement under terms deemed appropriate by the court. (Current law on sale or termination of easements would apply.)

2. Require that a landowner repay each easement holder, in the proportion in which each holder paid for the easement, the actual amount received at the time of purchase, plus a 9.3% annual rate of interest.

3. Require that a landowner repay each easement holder, in the proportion in which each holder paid for the easement, the fair market value of the land that is no longer able to fulfill its original purpose, with the fair market value determined as of the date the land is determined by the court to be no longer able to serve its original purpose.

4. Require that a landowner repay each easement holder, in the proportion in which each holder paid for the easement, three times the highest value category of tillable cropland in the city, village or town in which the easement or portion thereof is located.

5. In addition specify that any payments from the sale, modification or termination or easements be deposited into:

- a. The segregated working lands fund (as recommended by the Governor);
- b. The general fund; or
- c. Both the working lands and general funds, with each receiving half of the payment

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