The Intersection of Carbon Offsets and Conservation Easements

A number of carbon offset programs are problematic. Nevertheless, it is sensible to ensure that newly drafted grants of conservation easement clearly permit offset projects (whether or not such projects ever materialize).

CONTRASTING PERSPECTIVES ON CARBON OFFSETS

Carbon offsets are arrangements to reduce carbon emissions or increase carbon sequestration in one place to make up for carbon emissions that occur elsewhere. These arrangements involve the party responsible for carbon reductions receiving cash payments from a carbon polluter, typically managed by a carbon broker.

A multitude of perspectives exist regarding these arrangements. The following statements provide a sampling of these oftentimes conflicting perspectives:

- Carbon offsets channel powerful market forces into the service of achieving carbon reductions.
- Carbon offsets are a distraction from solving the problem and, as such, are part of the problem. The problem of increasing carbon levels in the atmosphere fundamentally results from moving the carbon from fossil fuels deep in the ground to greenhouse gases in the air. Arrangements that facilitate continued burning of these fuels—that excuse this burning—exacerbate the problem, providing cover for the continuation of practices that are simply not sustainable. Offsets create space for complacency in politics and public policy; they replace needed action with self-satisfaction at having done something.
- To be clear, carbon reduction and sequestration projects are good, just not when in the service of providing offsets.
- Voluntary carbon offset programs provide corporations a means—feasible to their businesses—to compensate for their environmental footprints; the good work accomplished with offset money would not occur otherwise. The corporate actions communicate to the public and policymakers the reality and threat of rising carbon levels (countering the rhetoric of carbon denialists).
- Offsets are first about money—money for brokers, inexpensive marketing for companies in the voluntary market, bargain-rate compliance for companies in the regulatory market. Only secondarily—if at all—are they about providing an environmental good. Carbon credit brokers are pursuing profit; environmental considerations are raised only to the extent necessary to serve profitability.

- There is nothing wrong with tying profit to achieving environmental good or with allowing some pollution in exchange for reducing it elsewhere. Just look at the tremendous reduction in acid rain achieved by the pollution trading system created under the George H.W. Bush Administration. The market can be a powerful ally in reducing carbon if structured correctly.
- The types of offset projects facilitated by carbon brokers should instead be directly incentivized by government, while companies should do all they can to directly reduce their carbon emissions.
- Government is not providing the incentives, nor is it mandating that companies do everything they can to directly reduce emissions. Offsets are far better than no action at all.
- The offset market features many assured pronouncements about the permanence of sequestration accomplished with offsets, but the state of scientific understanding seldom justifies such confidence and sometimes outright contradicts it. Motivated reasoning and wishful thinking abound.
- Offsets are only one aspect of corporate efforts to reduce their carbon footprints and reinforce the importance of these efforts. The sum of all the efforts makes a substantial, positive impact.
- Current forest carbon offset protocols and models are built on demonstrably false or commonsense defying assumptions that grossly inflate the possible additional carbon sequestration to be achieved with forest carbon offset programs as compared to what would actually happen otherwise.

ADDITIONALITY

Part of the debate concerning offsets as an appropriate response to atmospheric carbon levels involves the question of *additionality*. Reduction of carbon in the atmosphere is additional if it would not have occurred in absence of the carbon credits being provided as part of the offset project. If the reduction would have happened without the credits, then it is not additional. In other words, for a proposed carbon offset project, the carbon reduction is only additional to the extent that it would not have happened but for the financial incentive provided by the project.

Determining additionality is no easy task. It involves comparing the carbon reduction happening in the context of carbon credits being sold to what would have happened in the absence of the carbon credits. This requires calculating carbon reductions from the management practices agreed to under the offset project, a matter of no small complexity. It also requires calculating what would have happened carbon-wise in the absence of the credits, a tricky matter to say the least:

> Would the landowner have left those trees standing even without the offset payments? Would the land trust have really conducted a large-scale timber harvest on its recently acquired land? If it was in the farmer's long-term interest to conserve the carbon in the soil with or without offset payments, are the offset payments really accomplishing anything other than creating a new funding stream for the farmer?

More than one carbon offset project involving land conservation organizations has been challenged by reporters and other parties as having little or no additionality. Organizations have been accused of taking carbon offset money for committing to land management practices that they would have followed without any offset money.

Conversely, reporters have been criticized for presenting misleading pictures of carbon offset transactions, leaving out details not supportive of arguments that the transactions are misguided or corrupt.

LEAKAGE

Going beyond additionality questions, forest carbon offset programs have the fundamental problem of *leakage*. Leakage is when a reduction in timber harvesting as part of an offset project leads to increased timber harvesting elsewhere. If the global demand for timber remains essentially constant (a likely state of affairs), a reduction in harvesting in one location will result in an increase in harvesting somewhere else on the planet. And if the offset project were to reduce overall global demand for timber, one must then ask whether the material that replaces the timber (steel? concrete?) has a larger or smaller carbon footprint than the timber harvesting.

Leakage wipes out most (if not all) of the perceived carbon benefits of forest carbon offset programs that achieve their carbon targets through the reduction of harvesting.

A 2019 policy brief out of the Center for Environmental Public Policy (University of California, Berkeley) delves into the problem of leakage and the design of forest carbon offset programs. The first sentence of the brief expresses the seriousness of the issue:

> Analysis of projects generating 80% of total offset credits issued by the California Air Resources Board's (ARB) U.S. Forest offset protocol finds that 82% of these credits likely do not represent true emissions reductions due to the protocol's use of lenient leakage accounting methods.

While the quote addresses the California program, most offset programs have the same structural bias of grossly underestimating leakage.

This is not to say that a forest carbon offset program cannot achieve real carbon reductions through the introduction of innovative forest management techniques. However, this is not where harvest reduction-based programs are today.

ENTER THE CONSERVATION EASEMENT

Given questions about the appropriateness of offsets, the challenge of determining additionality, and the deep problem of leakage, how should conservation organizations address carbon offset projects and carbon credits when drafting conservation easement documents?

To answer this question, first recognize that a conservation easement can be thought of as relating to a potential carbon offset project in one of three ways:

1. The easement may be created in conjunction with a carbon offset project. (The easement might only be happening because it supports the offset project.) In this case, the specific offset program requirements and carbon sequestration targets will shape the drafting of the conservation objectives and covenants to be set forth in the easement document.
2. The easement may be created in the absence of a carbon offset program opportunity but with the knowledge that the opportunity to sell carbon credits could arise in the future or not. In this case, the easement's restrictive covenants will likely result in greater carbon sequestration than would have occurred in the absence of the easement. Thus, any credible offset program in the future would have to find additional carbon sequestration capacity in managing the property beyond the sequestration resulting from the easement restrictions.
3. The easement may have been created sometime in the past prior to anyone thinking about the easement's potential interaction with a carbon offset program.

In the case of an easement created in conjunction with a carbon offset, the organization that is to hold the easement should account for the possibility that the offset program could collapse or otherwise change dramatically at some future date as the organization addresses the easement's design and plans for easement stewardship. Beyond that, there are myriad variables presented by the various and changing carbon offset programs in operation. The Land Trust Alliance publication *Carbon Offsets in Conservation Easements* (2020) is an excellent resource for exploring many of these variables.

For the latter two scenarios, the question arises as to whether the easement's restrictive covenants will be written or were written to permit a landowner to engage in a carbon offset program.

ADDRESSING CARBON OFFSETS IN EASEMENTS

The opening section of this guide includes a number of arguments against carbon offset programs, the second section covers the substantial challenge of determining additionality, and the third addresses the deeply problematic issue of leakage. Nevertheless, there is a compelling case to be made for not precluding the possibility of lands conserved under conservation easements from participating in carbon offset programs:

- Even if one is opposed to carbon offset programs, an offset program's existence and operation will not rise or fall on whether easements permit eased land to participate.
- The future is full of unknowns. Whether or not today's offset programs are productive, it is ill-advised to preclude the possibility of an eased property from taking advantage of a future offset program, a program which could potentially be effective in reducing carbon in the atmosphere.
- Future receipt of carbon credits could fund additional conservation practices on the land that are not otherwise cost-feasible, resulting in improved conservation outcomes. It would be conservation-unfriendly to foreclose this possibility.
- The conservation-minded landowner who grants a conservation easement to a land trust will likely be quite unhappy to find at a later date that the easement document precludes even the possibility of receiving a carbon credit when less conservation-minded neighbors have that opportunity. This is a recipe for bad landowner relations and negative media attention. (Even if the easement allows offset projects, there may be some landowner disappointment that the easement's restrictions reduce the potential revenue to be had from offsets; barring any possibility of revenue compounds the possible level of disappointment.)
- Is it appropriate for a conservation easement to be used to block the sale of carbon credits, assuming all associated activities and uses on the land are consistent with the easement's restrictive covenants? Is this a matter that an easement holder would want to debate in either the court of public opinion or a court of law?

The next section describes and explains the changes made to the *Model Grant of Conservation Easement and Declaration of Covenants* to ensure that it does not preclude carbon offset projects involving the eased land.

ADJUSTMENT TO THE MODEL GRANT OF CONSERVATION EASEMENT AND DECLARATION OF COVENANTS

Carbon offset projects and credits were not considered in the development of the *Model Grant of Conservation Easement and Declaration of Covenants*. In 2023, WeConservePA is adding 2.02(d) "Commitments Regarding Resource Management Practices" to address the resulting ambiguities regarding such credits and related matters.

Ambiguity

Article 2 of the model sets forth covenants regarding separation and transfer of various rights associated with the Property.

The prohibitions contained in section 2.01 include:

> Transfer of development rights or other rights granted or allocated to the Property in support of land development outside the Property.

Is a carbon credit one such prohibited right? Can a carbon credit be construed as supporting land development outside the Property? Or is a carbon credit an interest in real property that would be addressed by the first prohibition of section 2.01? Is a carbon credit a real or personal property interest? Does it make a difference whether a carbon credit is created for the voluntary market or regulatory market?

These questions present uncertainties, a consequence both of the model being developed without attention to carbon credits and the unsettled state of the law in regard to them. To remove ambiguity going forward, WeConservePA is updating the model as follows.

Changes to the Model

The model document's subsection 2.02's title, "Permitted Changes," is shortened to "Permitted" and its opening statement is changed from "The following *changes* are permitted" to "The following *actions* are permitted." To the present list of three actions, a fourth is added:

> **(d) Commitments Regarding Resource Management Practices.** Commitments to implement resource management practices consistent with Conservation Objectives and otherwise permitted under this Grant together with the transfer of rights, credits, or offsets (for example, carbon or nutrient credits) arising from or related to such commitments.

Commentary

Purpose

The inclusion of this permission makes clear that easements created using the model in no way prevent carbon credit transactions, assuming those transactions don't require resource management practices contrary to the Conservation Objectives and restrictive covenants of the grant.

The permission is neutral regarding debates on the pros and cons of conducting carbon transactions on already conserved lands. It simply provides certainty that such transactions (subject to certain limitations) are possible under the easement if they are otherwise feasible.

Subject to Review

If you wish to empower the Holder to guard against potential conflicts between the operation of the easement and what might be included in a carbon deal before that deal is struck, start the item off with "Subject to Review, commitments to implement…" The model does not include the Review requirement because of the additional burden it would place on the Holder.

Prohibit Credits?

The argument has been made that allowing carbon credits to be created and purchased on already conserved land enables carbon emissions to continue elsewhere without truly offsetting those emissions, thus creating a net negative result for conservation. This argument assumes in part that the additional carbon sequestration to be obtained from the already conserved land is either illusory or quite small. The strength of this argument depends on the validity of the assumption, which will vary with the particular circumstances around each conservation project. Since the details of potential future carbon projects, and the offset programs under which they occur, cannot be known at the time of easement drafting, it seems unreasonable and potentially contrary to conservation aims to create a blanket prohibition on entering into carbon agreements.

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