

DEPARTMENT OF REGULATORY AGENCIES

Division of Conservation

CONSERVATION EASEMENTS

4 CCR 752-1

[Editor's Notes follow the text of the rules at the end of this CCR Document.]

Chapter 1: Definitions

The following definitions are in addition to those set forth at section 12-61-1106(1), C.R.S.

- 1.1. Conservation Easement: for the purpose of implementing part 11, article 61 title 12, C.R.S., an interest in real property as defined in section 38-30.5, C.R.S.,
 - A. for which an income tax credit has been claimed, or
 - B. for which an income tax credit application has been filed, or
 - C. for which an income tax credit application may be filed pursuant to section 39-22-522.
- 1.2. Days: calendar days for the purposes of implementing part 11, article 61, title 12, C.R.S.
- 1.3. Phased Conservation Easement: a conservation easement that is or is intended to be part of a series of conservation easements conveyed by the same landowner encumbering different areas of the same property.
- 1.4. Contiguous: for purposes of section 12-61-1106, C.R.S., this is defined as physically touching, sharing any boundary or corner; lands separated by a strip or parcel owned in fee simple by others are not contiguous.

CHAPTER 2: CERTIFICATION OF QUALIFIED ORGANIZATIONS THAT HOLD CONSERVATION EASEMENTS

Statement of Basis and Purpose

Pursuant to section 12-61-1104, C.R.S., the Division of Conservation, in consultation with the Conservation Easement Oversight Commission, establishes minimum qualifications for organizations that hold conservation easements as described and defined at rule 1.1 to encourage professionalism and stability.

- 2.1. Qualifications for certification of qualified organizations that intend to accept and hold new conservation easements

The Division may deny, refuse to renew, suspend or revoke the certification of a conservation easement holder who fails to meet the following minimum qualifications:

- A. Organization

The conservation easement holder:

1. pursuant to sections 12-61-1104(5) and (7)(a), C.R.S., is accredited by a national land conservation organization broadly accepted by the conservation industry; or
2. meets the requirements of a qualified organization under section 12-61-1104, C.R.S. and the qualifications in section 38-30.5-104(2), C.R.S., to hold a conservation easement; and
3. has the capacity to accomplish the work of the holder including, but not limited to
 - a. a board of sufficient size, skills, backgrounds and experience,
 - b. a sufficient number of staff and/or volunteers; and
4. if a non-governmental entity, the holder must be in good standing with the Colorado Secretary of State.

B. Conservation Easement Selection, Review and Approval

1. The conservation easement holder has and follows reasonable written policies and procedures for selecting conservation easements. These must include, but are not limited to
 - a. establishing and following selection criteria to identify conservation easements with at least one conservation purpose as defined in section 12-61-1106(1)(b), C.R.S.;
 - b. documenting the conservation purpose(s);
 - c. working with the conservation easement grantor on an individual basis to identify and design the permitted uses, reserved rights, and prohibited uses intended to be memorialized in the conservation easement;
 - d. establishing and following a written policy for accepting phased conservation easements as defined at rule 1.3 such that each proposed conservation easement of a phased project has at least one conservation purpose;
 - e. advising potential conservation easement grantors in writing that
 - i. they should seek their own legal, financial and tax advice;
 - ii. the holder does not provide legal, financial or tax advice;
 - iii. there may be adverse legal and other consequences if grantor terminates a conservation easement; and
 - iv. the holder neither promises nor guarantees that the proposed conservation easement qualifies for state income tax credit purposes.
2. The conservation easement holder has and follows reasonable written policies and procedures for reviewing proposed conservation easements. These must include, but are not limited to:
 - a. Declining projects that

- i. do not have at least one conservation purpose, or
 - ii. do not appear to have the necessary donative intent, or
 - iii. are potentially fraudulent or abusive.
- b. Prior to accepting the donation, having a title company or competent attorney investigate and report on the property's title and, when appropriate, engaging such professionals as may be necessary to evaluate the property's water and mineral rights;
- c. Evaluating title exceptions and, prior to accepting the donation, documenting how grantee addressed severed minerals or other exceptions to title so that they will not result in extinguishment or undermining of the expressed conservation purpose(s);
- d. Ensuring that, prior to accepting the donation, any liens or encumbrances are released, subordinated or addressed so that the conservation purpose(s) of the easement is protected in perpetuity;
- e. Providing sufficient information to the board of the holder, a qualified committee or other designee for review before a conservation easement is approved.
- f. Receiving, reviewing and acknowledging, prior to accepting the donation, a baseline documentation report for the conservation easement prepared pursuant to section 12-61-1106(5)(c), C.R.S. The review shall assess, at a minimum, that:
 - i. The report documents the physical condition of the property at the time of the gift. Such documentation may include:
 - A. Appropriate survey maps from the USGS showing the property line and other contiguous or nearby protected area;
 - B. A scale map of the area showing all existing man-made improvements or incursions (such as roads, buildings, fences or gravel pits), vegetation and identification of flora and fauna (including, for example, rare species locations, animal breeding and roosting areas, and migration routes), land use history (including present uses and recent past disturbances), and distinct natural features (such as large trees and aquatic areas);
 - C. An aerial photograph of the property at an appropriate scale taken as close as possible to the date the donation is made; and
 - D. On-site photographs taken at appropriate locations on the property
 - ii. The report documents accurately the conservation purposes of the easement; and

- iii. The report, including the maps and photographs, must be accompanied by a statement, signed and dated by its author(s), the easement grantor and the easement grantee, in substance saying "This natural resources inventory is an accurate representation of [the protected property] at the time of the donation of the conservation easement."
 - g. If a prior baseline documentation report is updated for use in connection with the second or subsequent phase of a conservation project, the update shall be a separate document preserved in the conservation easement holder's records, along with the original report.
 - h. Receiving and reviewing, before the donor submits a tax credit application pursuant to sections 12-61-1105 and 12-61-1106, C.R.S., a paper or electronic copy of the signed qualified appraisal prepared by one or more qualified appraisers for all conservation easements. The holder's review shall assess, at a minimum, that:
 - i. The physical aspects and legal description of the property that was appraised are the same as those described in the conservation easement;
 - ii. The conservation easement that was appraised is like, in every material aspect, the conservation easement that was recorded;
 - iii. The ownership of the property that was appraised is identical to the grantor of the easement; and
 - iv. The appraisal appears to be a qualified appraisal prepared by a qualified appraiser in compliance with section 12-61-1106(3)(b)(I)-(IV), C.R.S.
 - 3. Having the board of the holder approve all conservation easement donations, or establishing policies delegating the authority to approve transactions to a qualified committee or other designee;
 - i. Such review and approval must be documented; and
 - ii. If an entity other than the holder performs the due diligence and analysis described in parts 2., b., c., and d. of this section B., the holder must review the transaction and document that the project is consistent with its policies and procedures.
- C. Stewardship and Enforcement: Practices and Capacity
- 1. The conservation easement holder has the following written practices, policies and procedures to ensure the fulfillment of the perpetual stewardship responsibilities of each of its conservation easements including, but not limited to:
 - a. Monitoring all conservation easements no less than annually, using at least one of the following methods:
 - i. On-the-ground physical inspection of the property; or

- ii. aerial inspection of the property using manned or unmanned aircraft, or other methods in general use by other holders that monitor easements encumbering similar properties; and
 - iii. if aerial or other methods are used, conducting on-the-ground monitoring at least every five years.
 - b. Monitoring is documented in writing, and the documentation is reviewed by either the board of the holder, a qualified committee, or other designee;
 - c. Enforcing every conservation easement deed, including violations;
 - d. Reviewing proposed amendments to conservation easement deeds to confirm they
 - i. do not result in a net loss of conservation value, and
 - ii. do not create any non-incidental benefits serving the interests of grantor (impermissible private benefit).
 - e. Preserving important records, such as but not limited to, deeds, baseline documentation reports, monitoring reports and appraisals, in a safe and secure manner.
- 2. The conservation easement holder has the capacity to maintain, monitor and defend the purposes of its easements. If a non-governmental entity, these written policies must include, but not be limited to:
 - a. The holder maintains dedicated funds for the stewardship and legal defense of every conservation easement held. The funds must be managed in conformance with a financial plan, which may consider the value of insurance policies. The plan shall:
 - i. Ensure the longevity of the dedicated stewardship and enforcement funds;
 - ii. Determine the amount of stewardship and legal defense funds that will be needed. Minimum requirements are:
 - A. For stewardship, maintain a minimum fund balance of \$3,500 per conservation easement, and
 - B. For legal defense, maintain a minimum fund balance of \$100,000, or
 - C. For holders lacking sufficient money, provide a detailed plan with specific funding targets and timelines to achieve the minimum requirements in no more than two years.
 - b. Ensure that the dedicated funds for stewardship- and enforcement-related purposes are used only for these purposes or, as established through written policies, other allowable uses.

- c. If a government entity, sufficient funds must be allocated in the budget to steward and enforce conservation easements. Funds are not required to be held in a dedicated stewardship fund.

D. Finance

The conservation easement holder has and follows reasonable written fiscal policies and procedures to ensure the transparent and responsible management of its assets. These must include, but are not limited to:

- 1. Having the board of the holder review and/or regularly assess the holder's financial status, including the annual budget and any financial changes that have occurred; and
- 2. Having a financial evaluation conducted on an annual basis by an independent qualified accountant who has no financial or other interest in the holder. The level of evaluation is determined by the holder's total annual operating revenue, not including the cost or value of conservation easements or fee-owned properties:
 - a. Less than \$100,000 requires an annual compilation;
 - b. \$100,000-\$500,000 requires an annual financial review; and
 - c. More than \$500,000 requires an annual financial audit.

E. Governance

The conservation easement holder has and follows reasonable written policies and procedures to ensure responsible management. These must include, but are not limited to:

- 1. The holder has board meetings;
- 2. The holder has a written conflict of interest policy; and
- 3. Conservation easements and financial transactions with insiders must be documented and must demonstrate that there is no private inurement.

2.2. Qualifications for certification of qualified holders that do not intend to accept new conservation easements

Pursuant to 12-61-1104(7)(b), the Division shall offer a streamlined and lower-cost process for conservation easement holders that do not intend to accept new donations of conservation easements.

The Division may deny, refuse to renew, suspend or revoke the certification of a conservation easement holder who fails to meet any of the following minimum qualifications:

A. Organization

The conservation easement holder:

- 1. pursuant to sections 12-61-1104(5) and (7)(a), C.R.S., is accredited by a national land conservation organization broadly accepted by the conservation industry; or

2. meets the requirements of a qualified organization under section 12-61-1104, C.R.S. and the qualifications in section 38-30.5-104(2), C.R.S., to hold a conservation easement; and
 3. has the capacity to accomplish the work of the holder including, but not limited to
 - a. a board of sufficient size, skills, backgrounds and experience,
 - b. a sufficient number of staff and/or volunteers; and
 4. if a non-governmental entity, the holder must be in good standing with the Colorado Secretary of State.
- B. Stewardship and Enforcement: Practices and Capacity
1. The conservation easement holder has the following written practices, policies and procedures to ensure the fulfillment of the perpetual stewardship responsibilities of each of its conservation easements including, but not limited to:
 - a. Monitoring all conservation easements no less than annually, using at least one of the following methods:
 - i. On-the-ground physical inspection of the property; or
 - ii. aerial inspection of the property using manned or unmanned aircraft, or other methods in general use by other holders that monitor easements encumbering similar properties; and
 - iii. if aerial or other methods are used, conducting on-the-ground monitoring at least every five years.
 - b. Monitoring is documented in writing, and the documentation is reviewed by either the board of the holder, a qualified committee, or other designee;
 - c. Enforcing every conservation easement deed, including violations;
 - d. Reviewing proposed amendments to conservation easement deeds to confirm they
 - i. do not result in a net loss of conservation value, and
 - ii. do not create any non-incidental benefits serving the interests of grantor (impermissible private benefit).
 - e. Preserving original and duplicate copies of necessary and important records, such as deeds, baseline documentation reports, monitoring reports and appraisals, in a safe and secure manner.
 2. The conservation easement holder has the capacity to maintain, monitor and defend the purposes of its easements. If a non-governmental entity, these written policies must include, but not be limited to:

- a. The holder maintains dedicated funds for the stewardship and legal defense of every conservation easement held. The funds must be managed in conformance with a financial plan, which may consider the value of insurance policies. The plan shall:
 - a. Ensure the longevity of the dedicated stewardship and enforcement funds;
 - b. Determine the amount of stewardship and legal defense funds that will be needed. Minimum requirements are:
 - i. For stewardship, maintain a minimum fund balance of \$3,500 per conservation easement, and
 - ii. For legal defense, maintain a minimum fund balance of \$100,000, or
 - iii. For holders lacking sufficient money, provide a detailed plan with specific funding targets and timelines to achieve the minimum requirements in no more than two years.
- b. Ensure that the dedicated funds for stewardship- and enforcement-related purposes are used only for these purposes or, as established through written policies, other allowable uses.
- c. If a government entity, sufficient funds must be allocated in the budget to steward and enforce conservation easements. Funds are not required to be held in a dedicated stewardship fund.

C. Finance

The conservation easement holder has and follows reasonable written fiscal policies and procedures to ensure the transparent and responsible management of its assets. These must include, but are not limited to:

- 1. Having the board review and/or regularly assess the holder's financial status, including the annual budget and any financial changes that have occurred; and
- 2. Having a financial evaluation conducted on an annual basis by an independent qualified accountant who has no financial or other interest in the holder. The level of evaluation is determined by the holder's total annual operating revenue, not including the cost or value of conservation easements or fee-owned properties:
 - a. Less than \$100,000 requires an annual compilation;
 - b. \$100,000-\$500,000 requires an annual financial review; and
 - c. More than \$500,000 requires an annual financial audit.

D. Governance

The conservation easement holder has and follows reasonable written policies and procedures to ensure responsible management. These must include, but are not limited to:

1. The holder has board meetings;
2. The holder has a written conflict of interest policy;
3. Conservation easements and financial transactions with insiders must be documented to show that there is no private inurement; and
4. The holder advises grantors of amended conservation easements that the holder is not certified to hold conservation easements where grantor intends to apply for a state income tax credit.

2.3. Expiration Date for Certification

Certification for a conservation easement holder expires on December 31 following the date of issuance, or on the date set forth on the next year's renewal application provided by the Division, whichever is later.

2.4. Eligibility for Conservation Easement Holders After Revocation

A conservation easement holder whose certification to hold a conservation easement has been revoked is not eligible to re-apply for certification until more than two years have elapsed from the date of certification revocation. Any re-application after such two-year period is required to be submitted on a new application.

2.5. Certification Renewal

Renewal of a conservation easement holder certification shall be executed only with the renewal application provided by the Division, submitted and accompanied by the prescribed non-refundable fee prior to the expiration date of certification.

2.6. Reinstatement of Certification After Expiration

An expired certification may be reinstated within one year after the date of expiration if the holder meets all the requirements in section 12-61-1104, C.R.S. and rules 2.1 or 2.2. A complete renewal application and the prescribed non-refundable renewal fee must be submitted to the Division for reinstatement. Certification is effective on the date reinstatement is issued and shall not be effective retroactively. Any certification that has been expired for more than one year shall not be reinstated.

2.7. Disciplinary Action

The Director may impose an administrative fine not to exceed two thousand five hundred dollars (\$2,500) for each separate offense, as defined in subparagraphs A-E, below; and may revoke, suspend, or refuse to renew the certification of any conservation easement holder if, after an investigation and notice, and subject to the right to a hearing pursuant to the provisions of sections 24-4-104 and 24-4-105, C.R.S., the Director determines that the conservation easement holder:

- A. Has made false or misleading statements or material omission in their application for certification;
- B. Has misrepresented or concealed any material fact from a conservation easement grantor;

- C. Has employed any device, scheme, or artifice with intent to defraud a conservation easement grantor or any government agency;
- D. Has failed to comply with any stipulation or agreement made with the Director; or
- E. Has failed to comply with any of the certification requirements, or any lawful rule or regulation promulgated by the Director.

2.8. Information Request

A conservation easement holder must furnish to the Director such information or documentation as the Director in her/his sole discretion deems reasonably necessary for the enforcement of 12-61-1104, C.R.S. or any rules enacted by the Division. If information or documentation is required, the Director must give written notice, in detail, of the information so required and must allow the holder an additional twenty-one (21) days from delivery to present such material, which period may be extended only upon showing of good cause. Written notice may be hand-delivered or mailed by regular first-class mail, postage pre-paid, to the party entitled thereto. If hand-delivered, said notice is deemed delivered upon hand delivery. If mailed, said notice is deemed delivered as of the date of mailing.

2.9. Cease and Desist

If the Division has reasonable cause to believe any public or private holder is not in compliance with section 38-30.5-104 (2), C.R.S. and section 12-61-1104, C.R.S., the Director may issue an order requiring such organization to cease and desist from holding a conservation easement.

2.10. Transferring Conservation Easements to Non-Certified Entities

- A. A conservation easement holder must not assign or otherwise transfer any interest in a conservation easement to a non-certified holder.
- B. A non-certified entity must not accept an assigned or otherwise transferred interest in a conservation easement.
- C. Governmental entities transferring a partial interest in a conservation easement to another governmental entity in accordance with an established written agreement are exempt from this prohibition on transferring a partial interest in a conservation easement.
- D. All certified holders retaining any interest in a conservation easement must remain responsible for stewardship and defense of the conservation easement.

2.11. Courtesy Filing

A certified conservation easement holder must notify the Division within 30 days of a substantive change in:

- A. Physical or mailing address of the holder,
- B. Authorized contact person,
- C. Holder name,
- D. Holder mission, or
- E. Holder structure.

CHAPTER 3: CONSERVATION EASEMENT DONATIONS MADE ON OR AFTER MAY 29, 2018

Statement of Basis and Purpose

Pursuant to section 12-61-1104(7), the Division shall promulgate rules to effectuate the duties of the commission pursuant to article 4 of title 24. Such rules shall specifically address the following:

(d) The adoption of best practices, processes, and procedures used by other entities that regularly review conservation easement transactions, including a practice, process, or procedure deeming qualified conservation easement appraisals approved by these entities based on their independent reviews as credible for purposes of the conservation easement tax credit.

3.1 Tax credit application containing an appraisal that was prepared pursuant to section 12-61-1106(3)(b)(I)-(IV).

If another entity that regularly reviews conservation easement transactions has approved a qualified appraisal with a report date on or after May 29, 2018 for use by the other entity, the Director shall deem the appraisal as credible for purposes of the conservation easement tax credit if all of the following conditions are satisfied:

- A. The qualified appraisal has been independently reviewed by a real estate appraiser licensed in Colorado as a certified general appraiser who, as of the effective date of the review:
 - 1. is competent to appraise a conservation easement for the income tax purposes of its donor; and
 - 2. is competent to appraise the type of property appraised in the appraisal under review; and
 - 3. is in good standing with the Colorado Board of Real Estate Appraisers.
- B. The appraisal review was prepared in compliance with the substance and principles of the uniform standards of professional appraisal practice.
- C. The other entity certifies in writing to the Division that:
 - 1. it approved the appraisal for its own use; and
 - 2. the reviewed appraisal was a qualified appraisal made for the income tax purposes of the donor of the easement; and
 - 3. the independent review obtained by the entity for its use was prepared by a real estate appraiser licensed in Colorado as a certified general appraiser who, as of the date of the review:
 - a. was competent to appraise a conservation easement for the income tax purposes of its donor; and
 - b. was competent to appraise the type of property appraised in the appraisal under review; and
 - c. was in good standing with the Colorado Board of Real Estate Appraisers.

- D. The other entity provides the Division with a paper or electronic copy of the signed independent appraisal review it relied on as the basis for its approval of the qualified appraisal that was reviewed.

CHAPTER 4: APPLICATION FEES FOR CALENDAR YEAR 2019

Statement of Basis and Purpose

Pursuant to section 12-61-1104(7), the Division shall promulgate rules to effectuate the duties of the commission pursuant to article 4 of title 24. Such rules shall specifically address the following:

- (a) Allowing for the expedited or automatic certification of an entity that is currently accredited by national land conservation organizations that are broadly accepted by the conservation industry;
- (b) A streamlined and lower-cost process for conservation easement holders that do not intend to accept new donations of conservation easements for which tax credits would be claimed that focuses on the holder's stewardship capabilities;
- (c) The fees charged pursuant to subsection (3) of this section or section 12-61-1106(6), specifically ensuring that the fees are adequate to pay for administrative costs but not so high as to act as a disincentive to the creation of conservation easements in the state

4.1 Certification fees for entities currently accredited by a national land conservation organization

- | | | |
|----|---|---------|
| A. | Initial Certification Application Fee - Stewardship-only | \$500 |
| B. | Initial Certification Application Fee - Full certification | \$1,000 |
| C. | Conservation Easement Holder Renewal Fee - Stewardship-only | \$250 |
| D. | Conservation Easement Holder Renewal Fee - Full certification | \$500 |

4.2 Certification fees for entities not currently accredited by a national land conservation organization

- | | | |
|----|---|---------|
| A. | Initial Certification Application Fee - Stewardship-only | 1,000 |
| B. | Initial Certification Application Fee - Full certification | \$2,000 |
| C. | Conservation Easement Holder Renewal Fee - Stewardship-only | \$500 |
| D. | Conservation Easement Holder Renewal Fee - Full certification | \$1,000 |

4.3 Optional preliminary advisory opinions

- | | | |
|----|--|----------|
| A. | For an appraisal of a proposed transaction | \$10,000 |
| B. | For a proposed deed of conservation easement, conservation purpose, or other relevant aspect of a proposed transaction | \$2,000 |

4.4 Tax credit certificate applications

- | | | |
|----|---|---------|
| A. | For Donations made in 2011-2013 | \$305 |
| B. | For Donations made on or after January 1, 2014 or later | \$8,000 |

Editor's Notes

History

New rule emer. rule eff. 01/01/2019; expired 04/20/2019.

Entire rule eff. 06/14/2019.