Department of
Primary Industries and Regional Development

GOVERNMENT OF WESTERN AUSTRALIA

Tabled paper for Q9 Diane Evers

ATTACHMENT 4

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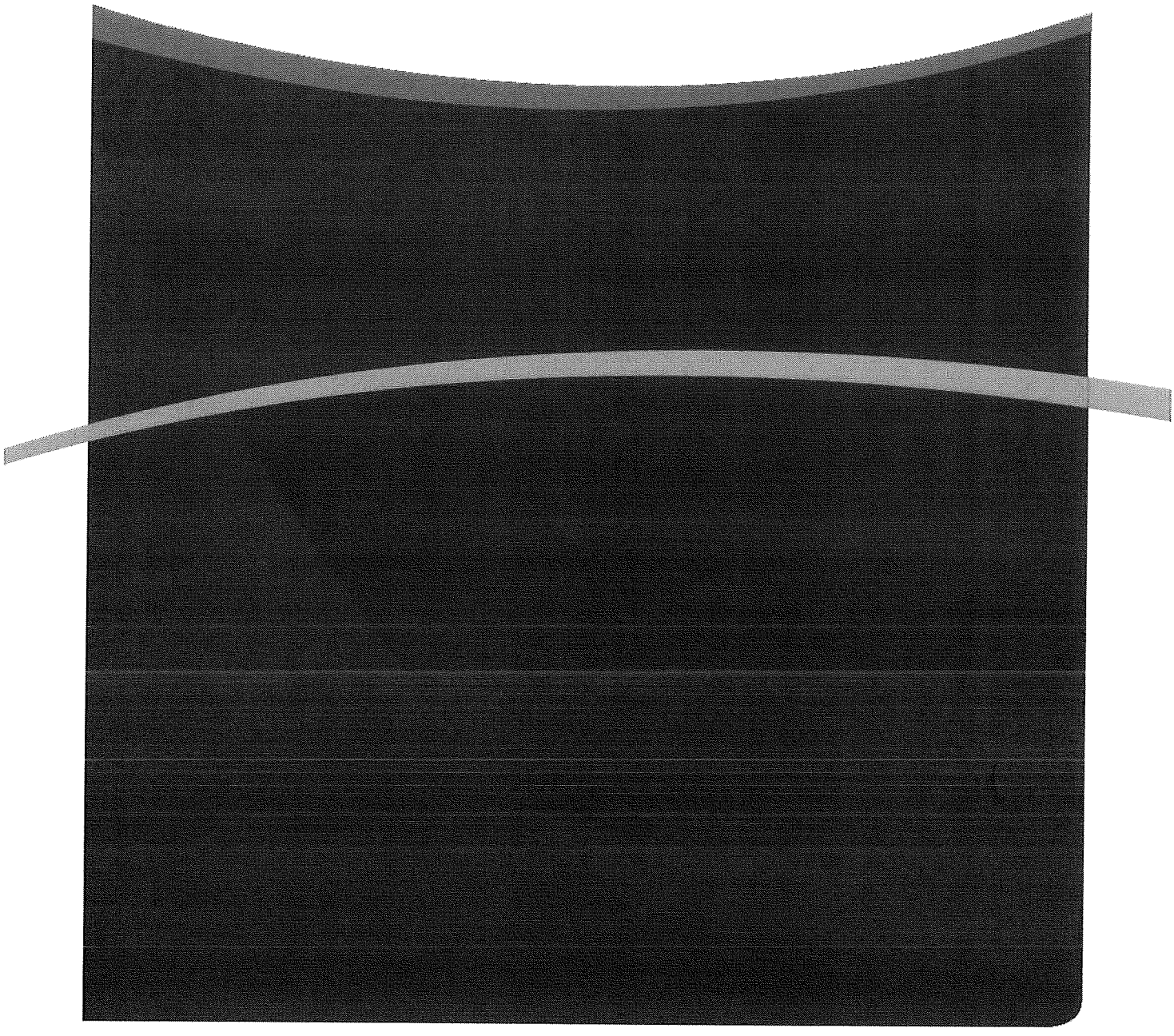
State Eligible Interest Holder Consent for Human-Induced Regeneration Carbon Sequestration Projects on Pastoral Lease Lands

Policy Positions



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Policy Position 1. Approach to native vegetation and environmental approvals in relation to Human-Induced Regeneration carbon farming projects

Issue

The statutory and regulatory regime as it relates to Native Vegetation Clearing Permits (NVCPs) and environmental approval processes will remain unchanged as a consequence of the Government providing Eligible Interest Holder (EIH) consent for Human-Induced Regeneration (HIR) carbon farming projects.

However, peak groups of the resources sector and the Department of Mines, Industry, Regulation and Safety (DMIRS) raised concerns that the presence of carbon farming projects has the potential to cause project delays and increased costs, particularly when converting exploration licences to mining leases, because:

1) HIR carbon farming projects may provide additional grounds for objections (by pastoral leaseholders, carbon farming proponents or third parties) to resource tenement applications
2) the improved condition of rangeland vegetation may make obtaining NVCPs and environmental approvals more difficult and/or take longer to finalise.

Policy position

Department of Water and Environmental Regulation to develop guidance addressing Native Vegetation Clearing Permits in carbon estimations areas.

Policy Position 2. Compensation for exploration and other low impact mining and petroleum activities

Issue

Given the low level of carbon sequestered per hectare and the very large HIR project areas, it is expected any carbon lost through native vegetation clearing for exploration or other low impact mining or petroleum activities will be *de minimus*.

In considering the provision of State EIH consent for HIR carbon farming projects on pastoral lease lands, DMIRS and the resources sector expressed concern regarding potential resource proponent compensation liabilities for the loss of sequestered carbon, as available under the *Mining Act (1978) (WA)*.

Whilst Cabinet does not support compensation being paid by a resource sector proponent for such loss resulting from exploration and other low impact mining activities (8 October 2018), it is not possible to fetter a statutory right by precluding carbon farming proponents from seeking such compensation under the Mining Act or PGER Acts.

Policy Position

State Government to compensate for loss of carbon production as a result of low impact mining/exploration activities.

Policy Position 3. Resource activity exclusions from carbon farming project areas

Issue

The proposed compensation regime, whereby the State will pay for compensation claims, only applies to exploration and other low impact mining activities.

The proposed approach to carbon project exclusions ensures that no compensation is required to be paid by resource sector proponents that have made decisions based on the current circumstances and to ensure that there is no requirement for mining lease or pending mining lease holders to accommodate carbon farming projects in lease areas.

The policy position reflects that fact that many lease holders are likely to agree to carbon farming projects and may be the proponent themselves in some cases.

Policy position

The following resource tenements must be excluded from carbon farming project areas unless the mining leaseholder agrees otherwise:

- Existing mining leases, general purpose licences and miscellaneous licences
- Existing pending mining leases, general purpose licences and miscellaneous licences
- Future pending mining leases (where there is no pre-existing carbon farming project)
- < 1 block Petroleum Production Licence areas
- State Agreement Areas and any existing or proposed State infrastructure.

Where a resource sector proponent agrees that a carbon farming activity can take place on their lease or licence area, the carbon proponent will not be eligible to have compensation for exploration and other low impact mining activities paid by the State Government.

Policy Position 4. Carbon Maintenance Obligations

Issue

Carbon farming activities that store carbon in vegetation or soils, such as the HIR methodology give rise to 'permanence obligations' that "run with the land" (Parts 7 and 8 of the *Carbon Credits (Carbon Farming Initiative) Act 2011(Cth)* (CFI Act)). Permanence obligations can mean that areas of land must be dedicated to the sequestration activity, maintained, protected or reinstated for the permanence period. This is 25 years in the case of the proposed HIR projects on Western Australian pastoral lease lands.

Carbon maintenance obligations (CMOs) are a discretionary power that could be used by the Clean Energy Regulator (CER) under section 97 of the CFI Act to retain the permanence of carbon stores over a particular area of land. If a CMO was placed over a HIR project area, the State (and any other person) would be prohibited from doing any activity on the land that results, or is likely to result in a reduction below the benchmark level[1] of the carbon sequestered in the land, unless that activity is a 'permitted carbon activity'.

While mining activities would only require clearing part of any project area, there is the possibility that the proponent or Government would have to acquit sufficient Australian Carbon Credit Units (ACCUs) to revoke the CMO from the entire project area, not just the area to be cleared. While the CFI Act is clear CMOs may be revoked or varied, there is currently no guarantee that a variation would be applied.

The CER has made clear that it is not the intent to lock up land for carbon faming and advised that a key policy factor in drafting the CFI Act was to ensure that land based sequestration methods had sufficient flexibility to allow for changing business opportunities over a piece of land. Accordingly the CFI Act allows for the removal of land from a project area, and the ceasing of the carbon farming on that land area.

The Clean Energy Regulator (CER), in a letter from its Chair, David Parker AM to DPIRD's Director General (27 June 2019) notes "A key policy factor in drafting the CFI Act was to ensure that land based sequestration methods had sufficient flexibility to allow for changing business opportunities over a piece of land [and] it was always recognised that more profitable business opportunities may arise... so it is not the intention to lock up land for carbon farming".

The State Government has worked with the CER to develop a guidance statement to clarify the variation of CMOs (at Appendix A). The legal weight of this guidance will emerge over time because all relevant decisions that the CER might make in respect of relinquishment or the imposition of CMOs are reviewable decisions, either as to the merits of those decisions or their legal validity.

Policy Position

The CER guidance provides sufficient comfort that, in the event that a CMO is imposed on a project that areas required for resource sector or other activities will be excised on payment of the required value of ACCUs. The Government will form a view as to the most suitable party to acquit the ACCUs on a case-by-case basis.

State Government accepts the CER guidance in relation to variation of a CMO under s98 of the CFI Act and expects that any requests to vary a CMO to accommodate resource sector activity will be approved by the CER.

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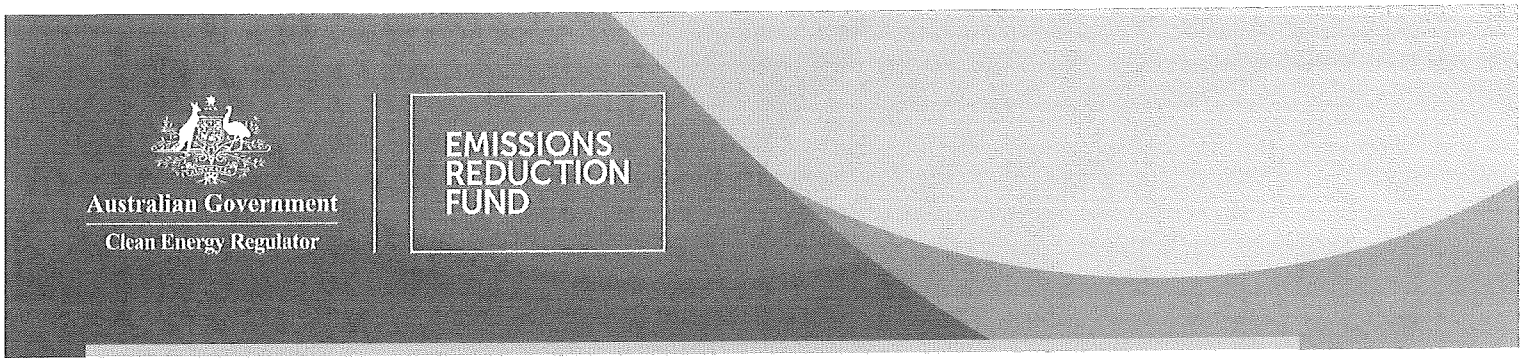
[1] the tonnes of carbon sequestered when the CMO was invoked.



APPENDIX A – Carbon Maintenance Obligation CER draft guidance 2019

Draft[2] guidance: Carbon maintenance obligations

Carbon maintenance obligation declarations are intended to prevent large-scale loss of carbon (below a specified level) from an Emissions Reduction Fund (ERF) project. They are intended as a compliance measure of last resort to protect the carbon stored by a project, and can only be used in very specific circumstances outlined below.

Generally, carbon maintenance obligations will not be required if projects are managed in line with vegetation method requirements or Australian Carbon Credit Units (ACCUs) have been relinquished for any carbon stores lost[3]. In addition, changes in land use will generally be managed by mutual agreement between the project proponent and other relevant eligible interest-holders. In such cases, an application to remove a particular piece of land from a project (thereby freeing it up for more profitable business opportunities), can be made. The variation to a project area is contingent on ACCUs equal in number to those associated with the specific land, being voluntarily cancelled. This is a standard application process. Further details are available on the Clean Energy Regulator website[4].

Process for making a carbon maintenance obligation declaration

[2] The draft is open for public consultation prior to the CER Board finalising the document.
[3] Under the ERF, projects are required to store carbon in vegetation or soils for either 25 or 100 years. These so-called 'permanence' obligations run with the land. See www.cleanenergyregulator.gov.au/ERF/Choosing-a-project-type/Opportunities-for-the-land-sector/Permanence-obligations.
[4] http://www.cleanenergyregulator.gov.au/ERF/Want-to-participate-in-the-Emissions-Reduction-Fund/Making-changes-to-your-project#Vary-your-project-area

The Clean Energy Regulator initiates the making of a carbon maintenance obligation declaration. As outlined below, this would be done only in very specific circumstances and can only be made in relation to land that was part of a sequestration project.

Before a carbon maintenance obligation declaration can be made, the Clean Energy Regulator must first:

- have required the relinquishment of ACCUs in relation to the project, and the relinquishment requirement have not been met or are unlikely to be met, or
- be satisfied that it is likely that a relinquishment of ACCUs in relation to the project will be required, and it is likely that the relinquishment requirement will not be met.

Carbon maintenance obligations apply to the carbon sequestered in land covered by a project. This means that the current landholder, and any other person who has the right to undertake activities on the land, will need to abide by the carbon maintenance obligation, regardless of whether they were involved in the project.

As part of making a carbon maintenance obligation declaration, the Clean Energy Regulator will engage with relevant parties, particularly in relation to the setting of the benchmark sequestration level and any 'permitted activities'—discussed further below.

Relinquishment

Carbon stored by sequestration projects may be lost, due to unavoidable natural disturbance or deliberate conduct. In certain circumstances, where the reversal has been significant, we may require a project proponent to relinquish a certain number of ACCUs issued for a sequestration project.

Instances where we may require relinquishment include where:

- ACCUs were issued based on false or misleading information provided to us
- registration of the project has been revoked
- carbon stored by the project was lost due to conduct (other than reasonable actions taken to reduce the risk of bushfire) engaged in by the project proponent, or another person within the reasonable control of the project proponent, or
- carbon stored by the project was lost due to natural disturbance (bushfire, drought, flood, pests or disease which could not reasonably be prevented by the project proponent) and the project proponent fails to take reasonable mitigation steps.

The requirement to relinquish ACCUs applies to the project proponent. The amount of ACCUs to be relinquished is specified by the Clean Energy Regulator and will depend on the nature of the relinquishment. For example, if the relinquishment is due to a project being revoked in its entirety, the amount of ACCUs to be relinquished would take into consideration all ACCUs issued to the project (less any ACCUs already relinquished). If the relinquishment was as a result of a loss of carbon stored due to a natural disturbance event, the number of ACCUs to be relinquished would take into consideration the amount of ACCUs issued in relation to the affected areas of the project.

Carbon maintenance obligation

Where a relinquishment requirement has been issued, the person has 90 days in which to comply. Following this period, or earlier, if the Clean Energy Regulator believes that the relinquishment requirement is unlikely to be complied with, the Clean Energy Regulator is able to make a carbon maintenance obligation declaration.

The Clean Energy Regulator may also make a carbon maintenance obligation declaration before a relinquishment requirement has been issued, where it believes that once issued, the relinquishment requirement is unlikely to be complied with (for example if the project proponent no longer exists).

Benchmark sequestration level

The benchmark sequestration level is the level of carbon sequestration that must be maintained under a carbon maintenance obligation.

The Clean Energy Regulator is responsible for determining the benchmark sequestration level, and this will be done as part of the carbon maintenance obligation declaration process. How the level is calculated will vary depending on the reason for the relinquishment.

For example, if the relinquishment requirement was in relation to a revocation of the project and the Clean Energy Regulator was satisfied that the abatement claimed throughout the life of the project was accurate, the benchmark sequestration level could be based on the offset reports and supporting documentation provided by the project proponent. Essentially, in this case, the benchmark sequestration level would be based on the total amount of carbon sequestration claimed throughout the life of the project.

However, the benchmark sequestration level reflects the amount of carbon sequestered in the relevant pool on the area or areas **at the time that the carbon maintenance declaration was made**.

Where the relinquishment was as a result of a reversal of carbon stock, the benchmark sequestration level would need to account for that reversal. This means that a person who is subject to a carbon maintenance obligation, who may not have benefited from the project, does not have to restore carbon stock that is lost **before** the carbon maintenance declaration was made. When setting the benchmark sequestration level the Clean Energy Regulator will make an assessment of the impact of any reversal event.

Similarly, where the relinquishment was as a result of false and misleading information, the Clean Energy Regulator would conduct its own assessment of the likely abatement achieved by the project.

In any of these cases, the Clean Energy Regulator would rely on a combination of reviewing the original information provided by the project proponent, desktop assessments, use of compliance monitoring tools and the application of the relevant Method formulas. The Clean Energy Regulator may also consider seeking access to the land to conduct ground truthing activities.

Permitted activities

Permitted activities may be specified in the carbon maintenance obligation declaration. Activities would only be permitted where the Clean Energy Regulator is satisfied that they would not result in the carbon stocks being reduced to below the benchmark sequestration level. These activities would allow areas that are subject to a carbon maintenance obligation to be used for productive purposes such as for grazing. Permitted activities could also include activities by native title holders in exercise of their native title rights where they were determined after the project became unconditionally declared.

Permitted activities will be specified in the carbon maintenance obligation declaration and will set out the manner, time, place, persons or time period during which the activity may be carried out. Permitted activities do not override any existing regulations around land use.

Notification of a carbon maintenance obligation declaration

Once the Clean Energy Regulator has determined the benchmark sequestration level and made the carbon maintenance obligation declaration, it will provide a copy of the declaration to the project

proponent, each person who holds an interest in the area (eligible interest holders), and the relevant land registration official.

Obligations under a carbon maintenance obligation declaration

- A person (regardless of whether or not they were involved in the project) must not conduct an activity that reduces or is likely to reduce the carbon stores on land subject to the obligation, below the level when the obligation was declared (benchmark sequestration level).
- An owner or occupier of the land subject to a declared carbon maintenance obligation is required to take reasonable steps to ensure that the carbon stores on the land are not less than the benchmark sequestration level. This obligation applies whether or not the person was owner or occupier of the land when the project was first registered.

If the carbon stores fall below the benchmark sequestration level, for example, because of bushfire, drought or an action by a neighbour or other third party, the owner or the occupier of the land must take all reasonable steps to ensure that carbon stores recover to the benchmark level.

In many cases, this would mean allowing vegetation to regrow. In some cases the owner or occupier may need to take more active steps to re-establish carbon stores.

The consent of 'eligible interest-holders' is required at project registration because it is important to ensure that persons who could be subject to, or have their interests in land affected by a subsequent carbon maintenance obligation have agreed to the land being brought into the offsets scheme.

Variation or revocation of declaration of a carbon maintenance obligation

While carbon maintenance obligation declarations protect the carbon stored by a project, the ability to vary the declaration to remove a particular part of land, or revoke the entire declaration, recognises that flexibility is required to accommodate changing business opportunities over a piece of land, over time.

Where a proposed activity will impact on the carbon stores of a particular area, a person may apply to us to vary or revoke a declaration of a carbon maintenance obligation. For example, if mining activity will result in a reduction in the carbon stores on land subject to the declaration below the level of when the declaration was made, then the miner or another person could apply for a variation of the declaration to remove land required for mining, from the scope of the declaration.

Similarly, a variation may be requested to add or change permitted activities associated with the declaration. For example, a native title group may want the carbon maintenance obligation declaration varied to include particular activities inherent in their native title rights. A landholder may also want to clear some area for a particular project, for example mining exploration, where the activities are not expected to bring the amount of carbon sequestered to below the benchmark sequestration level.

Providing flexibility in the management of carbon maintenance obligations will allow other commercial activities to continue, while recognising the impact on carbon stores that these activities may incur, and ensuring ACCUs continue to represent genuine and additional abatement.

Requesting the variation of a carbon obligation maintenance obligation

A person may submit a request to the Clean Energy Regulator, in writing, for a carbon maintenance obligation declaration to be varied so as to remove a specified area or areas of land. Such a request must include details of the land that the person is seeking to have removed.

On receipt of a request, the Clean Energy Regulator will notify the person of the amount of ACCUs that need to be voluntarily cancelled in order for the variation to be made. As a general rule, this amount will

be no more than the percentage of ACCUs issued in relation to the project, which is proportionate to the amount of land to be removed from the carbon maintenance obligation area, compared to the total amount of the carbon estimation area(s) in the project.

For example, if the carbon maintenance obligation covers an entire project area, and the area(s) of land to be removed make up 30 per cent of the project's total carbon estimation areas, the number of ACCUs to be voluntarily cancelled would be no more than 30 per cent of the total amount of ACCUs issued in relation to the project.

The person seeking the variation would then arrange to have the required number of ACCUs voluntarily cancelled. There is no requirement for these ACCUs to have originated from the project.

Once the Clean Energy Regulator is satisfied that the ACCUs have been cancelled for the purpose of facilitating the variation, it will vary the declaration to remove the relevant area(s) from the scope of the declaration.

The Clean Energy Regulator will take all reasonable steps to ensure that the variation is made within 30 days of the ACCUs being cancelled.

Notification of the variation of a carbon maintenance obligation declaration

Once the Clean Energy Regulator has varied a carbon maintenance declaration, it will provide a copy to the project proponent, each person who holds an interest in the area, and the relevant land registration official.

A carbon maintenance obligation will also be removed if:

- all ACCUs issued for the project are returned to the Clean Energy Regulator and land subject to the carbon maintenance obligation is no longer a part of any sequestration project
- all outstanding penalties for failing to relinquish ACCUs are paid in full, or
- the permanence period of the project expires.

The person making the application for revocation of the carbon maintenance obligation declaration or relinquishing the associated ACCUs does not need to be the original project proponent.