

EXPLANATORY STATEMENT

Issued by the Minister for Industry, Energy and Emissions Reduction

Carbon Credits (Carbon Farming Initiative) Act 2011

Carbon Credits (Carbon Farming Initiative) Amendment (Excluded Offsets Projects) Rule 2022

Purpose of Amendment Rule

The *Carbon Credits (Carbon Farming Initiative) Amendment (Excluded Offsets Projects) Rule 2022* (the **Amendment Rule**) remakes the excluded offsets projects list currently set out in regulations 3.36 and 3.37 of the sunseting *Carbon Credits (Carbon Farming Initiative) Regulations 2011* (the Regulations) as sections of the Rule.

The Amendment Rule streamlines the ERF scheme's regulatory framework by removing the need for the Regulations, while maintaining important protections against potential adverse environmental, social and economic impacts. As with the Regulations the Rule will continue to be subject to oversight by the Parliament.

Background: Emissions Reduction Fund

In 2014, the Australian Government amended the *Carbon Credits (Carbon Farming Initiative) Act 2011* (the Act) with the *Carbon Farming Initiative Amendment Act 2014* (CFI Amendment Act). The CFI Amendment Act established the Emissions Reduction Fund to support investment in carbon abatement projects across all sectors of Australia's economy.

The Act is supported by subordinate legislation, including the Principal Rule and the *Carbon Credits (Carbon Farming Initiative) Regulations 2011* (the Regulations). The Principal Rule and the Regulations provide detailed requirements relating to the way in which the Act is administered by the Regulator. The Minister for Industry, Energy and Emissions Reduction is empowered to make legislative rules under section 308 of the Act, consistent with the intention that new subordinate legislation under the Act will be in this form. Since the creation of the Emissions Reduction Fund (ERF) in 2015, the Regulations have been gradually transferred into the Principal Rule through amending instruments.

The ERF is a key component of the Government's policy agenda to drive emissions reductions across the economy and to fulfil Australia's international commitments under the Paris Agreement.

Outline

Offsets projects are not eligible to register to generate ACCUs if they are 'excluded offsets projects' (paragraph 27(4)(m) of the Act). A project is an excluded offsets project if it is of a kind specified in rules or regulations made pursuant to section 56 of the Act.

Paragraphs 106(4)(c) and 114(2)(c) of the Act require the Minister to have regard to any adverse impacts of this kind when considering whether to make a new ERF method or variation to an existing method. Section 56 allows the Regulations and the Rule to exclude

specified projects from participating in the ERF, in order to ensure projects do not have such impacts. Section 56 of the Act allows the Minister to specify in the regulations or legislative rules that certain types of ERF projects to be excluded if there is a material risk that the project will have a material adverse impact on one or more of the following: (a) the availability of water; (b) the conservation of biodiversity; (c) employment; (d) the local community; (e) land access for agricultural production.

Requirements in relation to excluded offsets projects were spread across both the Regulations and the Rule. The Amendment Rule consolidates legislative requirements in relation to excluded offsets projects in the Principal Rule, simplifying and modernising the regulatory framework for participants in the ERF scheme while maintaining protections against adverse impacts after the Regulations sunset on 1 April 2022. The Amendment Rule transitions all excluded offsets project types previously set out in the Regulations in to the Principal Rule, with minimal formatting changes and drafting changes to increase certainty by omitting incorporation by reference of other lists of weed species which do not exist.

Prior to sunset, the Regulations specified types of projects which are ‘excluded offsets projects’ for the purposes of the Act, meaning they are not eligible for participation in the ERF Scheme. The list of excluded offsets projects set out in the Regulations has also known been known as the ‘negative list’. These exclusions relate to:

- Projects involving an activity that was mandatory under a Commonwealth, State or Territory Law and is no longer mandatory because the law was repealed or became less onerous after 24 March 2011
- The establishment of vegetation in certain circumstances including;
 - Where the species being planted are known weeds in that area;
 - Where the forest is to be established under a specific forestry managed investment scheme;
 - On land where native forest has been illegally cleared or wetland illegally drained
 - On land that has been subject to clearing or draining that was not illegal, within 7 years of application for registration of a project (or 5 years where land ownership has changed);
 - Certain circumstances where a clearing consent or harvest approval plan was granted on the basis that clearing or harvesting would contribute to an environmental benefit or was for fire management;
 - Specified tree planting. In addition, the Regulations set out circumstances where ‘specified tree planting’ projects are not considered to be excluded offsets projects, including where planting of trees is unlikely to have a material adverse on the availability of water due to its location in a specified region.

Consistent with section 56 of the Act, the Minister is satisfied that the continued exclusion of these kinds of projects is appropriate to address material adverse impacts on the availability of water; the conservation of biodiversity; the local community and land access for agricultural production that would otherwise occur.

Detailed description of the Amendment Rule

Attachment A outlines and describes the sections in the Amendment Rule.

Public consultation

Public consultation was undertaken from 3 March 2022 to 17 March 2022 on a discussion paper setting out the proposed amendments to the Principal Rule. Submissions were received both in support of and opposing the proposed amendments. The majority of submissions received expressed strong support for retaining the entirety of the excluded offsets projects list if they were moved in to the Rule, and were generally supportive of consolidating those requirements in the Principal Rule. No changes were made to the proposal to transition all excluded offsets project types in to the Principal Rule after submissions were considered.

Regulatory impact

The Department of the Environment certified the ERF White Paper as a Regulation Impact Statement for initial decisions on the ERF. These decisions included the ERF crediting and purchasing arrangements, Carbon Farming Initiative arrangements incorporated into the ERF (including the negative list) and coverage of the ERF safeguard mechanism in accordance with the Australian Government Guide to Regulation.

Statement of compatibility with human rights

A statement of compatibility with human rights for the purposes of Part 3 of *the Human Rights (Parliamentary Scrutiny) Act 2011* is set out at Attachment B.

Details of the sections in the *Carbon Credits (Carbon Farming Initiative) Amendment (Excluded Offsets Projects) Rule 2022*

1. Name

Section 1 provides that the name of the Amendment Rule is the *Carbon Credits (Carbon Farming Initiative) Amendment (Excluded Offsets Projects) Rule 2022*.

2. Commencement

Section 2 provides that the Amendment Rule would commence on the latter of the day after it is registered or 1 April 2022. This ensures there is no overlap in effect between the Amendment Rule and the Regulations.

3. Authority

Section 3 provides that the Amendment Rule would be made under section 308 of the Act. The power to make rules in section 308 of the Act includes the power to amend or revoke rules that have already been made, with any doubt about this resolved by subsection 33(3) of the *Acts Interpretation Act 1901*.

4. Schedules

Section 4 provides that the Amendment Rule would, when made, amend the *Carbon Credits (Carbon Farming Initiative) Rule 2015 (the **Principal Rule**)* in the manner set out in the schedules.

Schedule 1—Amendments

Item 1: After Section 20A

This item creates new sections 20AA and 20AB, which contain the provisions relating to excluded offsets projects previously set out in regulations 3.36 and 3.37 of the Regulations.

Section 20AA brings the excluded offset project definition from regulation 3.36 into the Principal Rule. The general purpose of the definitions remains the same as the original regulations.

No lessening of regulatory requirements.

Paragraph 20AA(1)(a) excludes a project that involves an activity that was mandatory under a Commonwealth, State or Territory law; and is no longer mandatory because the law was repealed, or amended to be less onerous, after 24 March 2011. This means all levels of government cannot reduce environmental protections to bring projects into the scheme. For example, if regulation requires the capture and destruction of a certain level of methane, a project to implement that requirement would not pass the regulatory additionality test for registration. If the law was repealed or amended to lower the requirements, that project would still be excluded by paragraph 20AA(1)(a). The 24 March 2011 date was the date when the Act was first introduced to Parliament.

No planting weed species

Paragraph 20AA(1)(b) excludes a project proposing to plant defined weed species. These are likely to have adverse environmental impacts and should not be credited. The reference to unspecified 'other lists' in the Regulation has been removed as no relevant lists are published.

No support from forestry managed investment schemes

Paragraph 20AA(1)(c) excludes projects that get double benefits from crediting and favourable tax treatment from the forestry managed investment scheme rules. This raises additionality concerns and has the potential to impact land access for agricultural production and local communities.

No previous illegal clearing or draining of wetlands

Paragraph 20AA(1)(d) excludes projects which establish vegetation on land that has previously been illegally cleared or a wetland that has been illegally drained. The intention is to avoid rewards that are based upon past illegal behaviour which had lessened the carbon stored in the land. The clearing of native forest or draining of a wetland has been done illegally where the Regulator is satisfied that the clearing or draining was an offence against a law of the Commonwealth, State or Territory, whether or not a court has considered that offence. Clearing is defined as the conversion of native forest to cropland, grassland or settlements and so does not include the management of land which is already cropland or grassland, such as suppression activities on that land. This paragraph helps avoid adverse environmental impacts.

No clearing within 7 (or 5) years

Paragraph 20AA(1)(e) excludes projects which establish vegetation on land that has been cleared of native forest, or wetlands drained, within 7 years of their application. There is a 5 year limit if the ownership of the land has changed. The intent is to avoid intact native forest, which would store significant carbon, being cleared and then a project credited for the re-establishment of a carbon store, such as by an environmental planting soon afterwards. Clearing is defined as the conversion of native forest to cropland, grassland or settlements and so does not include the management of land which is already cropland or grassland, such as suppression activities on that land. This paragraph helps avoid adverse environmental impacts.

Limitations for native forest protection

Paragraph 20AA(1)(f) excludes projects that protect native forest on freehold or leasehold land, for which a clearing consent or harvest approval plan was granted on the basis that the clearing or harvesting of the native forest would lead to an environmental improvement or benefit, or would maintain an environmental outcome or was for fire management purposes. This is subject to the exception in subsection 20AA(2). The relevant methodology determinations have been developed to cover circumstances which are not excluded by these requirements. This helps avoid adverse environmental impacts.

Specified tree planting

Section 20AB incorporates regulation 3.37 into the Principal Rule. This concerns projects to plant trees (such as plantations) which risk having adverse impacts on the availability of

water. The section provides for a number of exceptions where water issues are unlikely to be material or are managed appropriately. These include:

- where the area receives less than 600 millimetres of long term average rainfall;
- where the project is an environmental planting;
- where the project contributes to the management of dryland salinity;
- where requirements to manage water interception in the National Water Initiative have been implemented;
- where the region is identified on a map as an area where the planting of trees is unlikely to have a material adverse impact on the availability of water;
- where water access entitlements are held;
- where water access entitlements are not available (but the catchment is not fully allocated).

Section 20AB includes provisions that were inserted into regulation 3.37 by the *Carbon Credits (Carbon Farming Initiative) Amendment (Excluded Offsets Projects) Regulations 2020*. These provisions reduced the regulatory burden of regulation 3.37 by allowing projects to proceed in specified regions where tree planting is unlikely to have a material adverse impact on the availability of water. Projects in these regions are not excluded (see subsection 20AB(5)). To date five regions have been specified and further regions are under assessment for inclusion.

Documents incorporated by reference

These sections incorporate a number of documents by reference, consistent with the power in section 304 of the Act. These are necessary to effectively implement the requirements and ensure the rule remains relevant to current risks and frameworks outside of the scheme.

The report titled *IPCC 2006, 2006 IPCC Guidelines for National Greenhouse Gas Inventories*, prepared by the National Greenhouse Gas Inventories Programme, is incorporated as in force from time to time. The report is freely accessible at www.ipcc.ch/ and is an important document for international greenhouse gas accounting.

The ‘CFI rainfall map’ is a longstanding document for the scheme that shows long term average annual rainfall necessary to determine if a project is above or below the 600mm long term average rainfall threshold for the application of section 20AB and thresholds for water entitlements. The map is freely accessible at www.industry.gov.au and assists the implementation of the requirements.

The *Income Tax Assessment Act 1997* is incorporated to define forestry managed investment schemes and is freely available from www.legislation.gov.au.

The ‘Weeds of National Significance’ list produced by the Australian Government for the purpose of identifying weeds is freely accessible at <https://weeds.org.au/>. It is an important listing of weeds that would be of concern to the scheme.

The following State and Territory weed legislation is also incorporated, with relevant legislation websites freely available from <https://info.australia.gov.au/information-and-services/public-safety-and-law/legislation/states-and-territories>

- the *Biosecurity Act 2015* of New South Wales;
- the *Catchment and Land Protection Act 1994* of Victoria;
- the *Biosecurity Act 2014* of Queensland;
- the *Biosecurity and Agriculture Management Act 2007* of Western Australia;
- the *Agriculture and Related Resources Protection Act 1976* of Western Australia;
- the *Natural Resources Management Act 2004* of South Australia;
- the *Weed Management Act 1999* of Tasmania;
- the *Pest Plants and Animals Act 2005* of the Australian Capital Territory;
- the *Weeds Management Act 2001* of the Northern Territory.

The ‘Salinity Guidelines’ are published on the Department’s website as in force from time to time, to assist project proponents to determine whether the planting of trees is an excluded offsets project. The guidelines are freely accessible at www.industry.gov.au and an important tool for the management of dryland salinity to be assessed and verified.

The ‘National Water Initiative’ means the Intergovernmental Agreement on a National Water Initiative between the Commonwealth of Australia and the Governments of New South Wales, Victoria, Queensland, Western Australia, South Australia, Tasmania, the Australian Capital Territory and the Northern Territory. The ‘National Water Initiative’ is freely accessible at <https://www.awe.gov.au/water/policy/policy/nwi> and is incorporated as amended from time to time.

The map of area where the planting of trees is unlikely to have a material adverse impact on the availability of water for subsection 20AB(5) is freely available from the Department’s website at www.industry.gov.au and is incorporated as in force from time to time. This allows the potential impacts of water to be assessed and reviewed over time.

Item 2:

Item 2 of the Amendment Rule inserts a new section which provides that if the Regulator is considering an application on the commencement of the Amendment Rule, the excluded offsets project definition in the *Carbon Credits (Carbon Farming Initiative) Regulations 2011* as in force immediately before 1 April 2022 applies to that application instead of sections 20AA and 20AB. This ensures the existing definition which projects have based their applications upon applies to those applications.

Statement of Compatibility with Human Rights

Prepared in accordance with Part 3 of the Human Rights (Parliamentary Scrutiny) Act 2011

Carbon Credits (Carbon Farming Initiative) Amendment (Excluded Offsets Projects) Rule 2022

The *Carbon Credits (Carbon Farming Initiative) Amendment (Excluded Offsets Projects) Rule 2022* (the **Amendment Rule**) is compatible with the human rights and freedoms recognised or declared in the international instruments listed in section 3 of the *Human Rights (Parliamentary Scrutiny) Act 2011*.

Overview of the Legislative Instrument

The *Carbon Credits (Carbon Farming Initiative) Act 2011* (the **Act**) enables the crediting of greenhouse gas abatement from emissions reduction activities across Australia. Greenhouse gas abatement is achieved either by reducing or avoiding emissions, or by removing carbon from the atmosphere and storing it.

The *Carbon Credits (Carbon Farming Initiative) Rule 2015* details additional administrative procedures under the Act, including information and audit requirements for project applications and reports, the fit and proper person test for participants, procedures for parts of the carbon abatement purchasing process, the length of reporting periods, and notification and record-keeping requirements.

The Amendment Rule remakes the excluded offsets projects list currently set out in regulations 3.36 and 3.37 of the sunseting *Carbon Credits (Carbon Farming Initiative) Regulations 2011* (the Regulations) as sections of the Rule. The Amendment Rule is made with some minor drafting changes to ensure the amendments are in accordance with contemporary drafting principles and fit for purpose.

Human rights implications

The Amendment Rule does not engage any of the applicable rights or freedoms.

A detailed statement of compatibility of the provisions of the Emissions Reduction Fund is provided in the Explanatory Memorandum for the *Carbon Farming Initiative Amendment Bill 2014*:

<https://www.legislation.gov.au/Details/C2014B00129/Explanatory%20Memorandum/Text>.

Conclusion

The Amendment Rule is compatible with human rights because it does not limit any human rights and freedoms recognised or declared in the international instruments listed in section 3 of the *Human Rights (Parliamentary Scrutiny) Act 2011*.