



Kimberley Land Council

Eligible Interest Holder Consent for Carbon Projects

November 2021

Purpose

This brief is provided to PBCs as an explanation of Eligible Interest Holder consent considerations in relation to carbon projects on their Native Title lands.

It is to be read in conjunction with the Indigenous Carbon Industry Network's *Guide to Seeking Free Prior and Informed Consent from Indigenous Communities for Carbon Projects* and with potential reference to the KLC's *Introduction to Emissions Avoidance and Sequestration*, both of which can be accessed via the KLC website <https://www.klc.org.au/savanna-burning-carbon-projects>.

This brief is intended as general guidance only, and does not constitute formal legal advice. Prior to providing EIH consent to a carbon project, PBCs should consider the need to obtain formal legal advice, and ensure they fully understand all the consequences of a specific proposed project. However, this standard is not mandated by the law.

SUMMARY

Third parties can apply to register carbon projects over Native Title land as long as they can demonstrate they have the legal right to access the country and carry out the activity to earn carbon credits.

However, in order to earn carbon credits from a carbon project under the Commonwealth's Emissions Reduction Fund (ERF), a project owner must obtain formal consent – effectively approval – from all so-called Eligible Interest Holders (EIHs).

EIHs are all parties with an interest in the land. Under the *Carbon Credits (Carbon Farming Initiative) Act 2011* (CFI Act), for carbon projects (proposed to be) registered over land where Native Title exists, the relevant PBC is considered an EIH and therefore can decide whether to give consent or not to a (proposed) project over the Native Title land.

It should be expected that such third parties follow the principles of free, prior and informed consent (FPIC) throughout the process of consultation and negotiations with the PBC(s), in line with the *United Nations Declaration on the Rights of Indigenous People* and the *Native Title Act*.

Eligible Interest Holder (EIH) consent for carbon projects

- Under the CFI Act, in order to earn credits from a carbon project under the ERF, a project owner requires formal consent from all EIHs.
 - For carbon projects over Native Title land, the CFI Act identifies the relevant PBC as EIH.
- If consent is withheld by an eligible interest holder (e.g. the relevant PBC), the project cannot earn credits under the ERF; i.e. the PBC has a right to say 'no'.



- If the PBC is considering giving consent, it is important to consider the type of the (proposed) project. There are two main types of carbon projects that result in different obligations:
 1. Emissions Avoidance projects are projects that reduce greenhouse gas emissions by avoiding pollution going into the air.

Consent for such a project is not considered a native title decision if the proponent already has the legal right to access the land and carry out the activity (e.g. savanna burning). If the proposed proponent does not have the legal right for the access and activities, they will need to obtain that legal right, which could be a future act.

If the consent is only for the project (which is not a future act), the PBC Board can make a decision on whether or not to give consent to the carbon project in line with the PBC's Rule Book (and, if appropriate, in line with any other process of decision-making of the native title holders or appropriate Traditional Owners for the country affected).
 2. Sequestration projects are projects that store carbon – for example in (unburnt) trees. Because a sequestration project entails an obligation to maintain carbon stored in the landscape over several decades (25 years or 100 years!) – this is known as a permanence obligation –, it is the KLC's advice that the registration of a sequestration project may be a Future Act under the *Native Title Act 1993 (Cth)*, requiring an Indigenous Land Use Agreement (ILUA) prior to project registration.¹
- Depending on the above, EIH consent can be given:
 - via the Government's prescribed eligible interest holder consent form, or
 - through an ILUA.
- Consent is only given once. If / once consent is given by the PBC and any other EIHs and the project is unconditionally registered, consent *cannot be withdrawn for the duration of the project* and the project owner will effectively control all aspects of the carbon project, including how to run and pay for it, and how carbon credits and resulting revenue is used – subject only to any separate contracts covering these matters explicitly.
 - If – in exchange for its consent – the PBC would like to negotiate any conditions, or sharing of benefits / revenue generated by the project, this would have to be done separately through a separate contractual arrangement (ILUA or otherwise) *before* consent is granted.
 - Once a project has been unconditionally registered, and has been awarded carbon credits, this would prevent anyone else from registering a project under the same method over that area in the future, even if the existing project later failed.

¹ The registration of a sequestration project gives the Regulator power to issue orders over how the land is used, called a Carbon Maintenance Obligation (CMO). CMOs can affect native title rights and interests however native title holders have no future acts rights when a CMO is going to be issued. This means that the act that gives the power to the Regulator to issue the CMO should be treated as a future act. This act is the registration of the sequestration project.



Conditional declarations of carbon projects

- A (proposed) project owner, also known as the proponent, who has the legal right to carry out the project activity on the (proposed) project area, *can register* a carbon project without EIH consent, but *cannot actually earn credits without consent*.
 - Registering a project without consent is called a conditional registration, with the declaration of the project by the Clean Energy Regulator (CER) contingent upon gaining all EIH consents before credits are awarded.
 - All other aspects of a conditional registration – except consent – have the same requirements as an unconditional registration, so the initial application for registration is still the most significant step in starting a project: The (proposed) project proponent needs to define what type of methodology the project will use, how it will be run, how long it will operate for (including choice of permanence period for sequestration projects), provide an estimate of forecast carbon credits etc.
 - Therefore, third party applications for conditional registrations of carbon projects over Native Title land are *not* best practice as they contravene the principles of FPIC.
- If a project has been conditionally registered, and the project owner fails to obtain that consent by the end of the first reporting period, the CER can revoke (cancel) the project. This can take two to five years depending on the project. During that time, the land is effectively dedicated to the carbon project.
- In principle, KLC strongly advocates against conditional registration of carbon projects over Native Title land by third parties before formal EIH consent is obtained from the relevant PBC(s) because registrations without consultation with Native Title holders contravene the principle of free, prior and informed consent (FPIC).
- ICIN's Guide to *Seeking Free Prior and Informed Consent from Indigenous Communities for Carbon Projects*, co-developed by the KLC, gives guidance to third party project proponents relating to best practice engagement with relevant PBCs in regards to (proposed) carbon projects. PBCs can also refer to this Guide to understand the expectations they can have when approached by project developers.

A note on 'baselines'

- The 'baseline' of a carbon project is a period prior to the start of the project which is used to compare the project period against and calculate carbon credits earned.
- The duration of this baseline depends on the method (for example, 10 or 15 years).
 - The average emissions (for emissions avoidance projects) or carbon stored (for sequestration projects) during the baseline period are calculated and are used to compare each of the project years to.
 - In general terms, carbon credits for each of the project years are earned if there is an improvement compared to the baseline, i.e. fewer emissions (for emissions avoidance projects), or more carbon stored (for sequestration projects).



- The period that makes up the baseline is determined by the timing of project registration: The baseline ends in the year before the project starts (i.e. the last year of the baseline period is the year before the project is registered).
- The baseline influences the number of carbon credits generated in each project year, because each year is compared to that baseline. This means that the timing of project registration (via the baseline) has an impact on the number of carbon credits generated from a project.
 - A project registered in 2020, for example, with a 10-year baseline, will have a baseline from 2010 to 2019. All project years are compared to average emissions over that baseline period, and carbon credits are earned for the difference (abatement).
 - If the same project was registered in 2021 instead, the project years are compared to a different baseline (2011-2020), so a different number of carbon credits are earned.
- Some (proposed) project proponents use this 'baseline argument' to try to justify applications for conditional registrations for a project without prior consultation with EIHS (including PBCs), because a conditional registration 'locks in' the baseline; however, this is not in line with the basic principles of FPIC, nor considered best practice as defined in the Carbon Market Institute's Australian Carbon Industry Code of Conduct.

Initial questions for the EIHS – including PBCs – to ask about a proposed project

The following are some initial considerations PBCs may want to look at when approached by a third party in relation to a (proposed) carbon project on their Native Title land.

1. **Method:** What type of carbon project would the project be? Is the method an Emissions Avoidance method, or sequestration method? If it is sequestration, what permanence period is proposed – 25 years or 100 years?
2. **Area:** What is the exact area over which the carbon project is (proposed) to be run?
3. **Objectives:** Would the project and its objectives align with Traditional Owner aspirations, cultural and environmental values, existing land management plans, be compatible with other land uses, and have widespread community support?
4. **Governance:** Who would own the project? Do they have the legal right?
5. **Decision-making:** Who would make operational decisions? Will the PBC have any influence?
6. **Timing:** When should the project be registered? When will consent be required by?
7. **Cost:** How will operations be funded until the first carbon credits are generated and sold?
8. **Ops:** Who will undertake operational planning and delivery? Will the PBC have any influence?
9. **Admin:** Who will undertake carbon project administration, compliance and reporting?
10. **ACCU sales:** Who will make decisions on sales (price, buyers etc)? Will the PBC have any influence?



11. **Revenue:** Who will receive revenue from the carbon credits? Will the PBC ask for a share?
12. **Investment:** What will carbon revenue be used for? How will this be decided?
13. **Planning:** How will any long-term obligations be managed? *Refer above re sequestration projects and future act implications.*
14. **Personnel:** Who will take on key roles? Will the PBC have any influence?

A note on legal right

- Legal right in the context of carbon projects means the right to access the land and carry on the activity required under the chosen carbon method, and earn carbon credits for it.
- Legal right may sit with more than one person/entity at the same time; if the legal right is not exclusively held by the intended project owner, other legal right holders may need to transfer their legal right – i.e. give permission – to the person/entity intending to register the project.

Contact

KLC is available to provide support and advice in regards to the above matters:

Kristina Koenig, Program Manager Carbon, Land & Sea Management Unit, Kimberley Land Council (KLC). Mobile: 0447 482 003. Email: kristina.koenig@klc.org.au