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SCOTTISH LAND COMMISSION
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An Interim Guide to Securing Tradeable Carbon Credits in an Agricultural Holdings Situation

This interim guide explains the principles of carbon credit trading and the relevance to landlords and tenants of agricultural holdings in Scotland.

As Woodland and Peatland Codes are the only carbon codes currently operational in Scotland, this guide provides a summary of the implications for landlords and tenants wishing to acquire carbon credits from woodland creation or peatland restoration.

Further development of the carbon market and voluntary standards is likely, and the guide will be updated to reflect that.

It does not set out every detail of the applicable law, and users of this guide are advised to obtain independent legal advice relevant to their particular circumstances before acting upon any of the information contained in this guide.

1. Introduction

The climate emergency has focussed attention on the capacity of land and land management activities to lock up carbon in the soil or in vegetation growing on the land. Government grants are used to encourage activities such as woodland creation and peatland restoration and the emergence of a market in carbon, and the ability to trade carbon credits, is providing another incentive to landowners and managers. This guide seeks to explain the principles of carbon credit trading and the relevance to landlords and tenants of agricultural holdings in Scotland. The guide deals with the situation as it currently stands but further development of the carbon market and the voluntary standards is likely, and the guide will be updated to reflect that.

2. Carbon Credits

If a land manager carries out an activity such as peatland restoration or woodland creation that removes additional carbon from the atmosphere, credits can be attached to the activity in proportion to the amount of carbon removed and the land manager may be able to sell those credits to another business that needs them to offset emissions from that business that are difficult or impossible to avoid. This has created a market in carbon credits that are traded at a price that reflects current supply and demand and other market conditions. In some situations, the value attached to validated carbon credits can be significant.

3. The Voluntary Standards (Codes)

Buyers of carbon credits need to be assured that they are being generated by a responsible scheme which has recognised standards and procedures and in which the carbon benefits claimed have been properly validated. This has led to the emergence of voluntary standards (codes) for peatland restoration and woodland creation. Other Codes are likely to emerge for other land-based carbon sequestration activities such as soil carbon enhancement and hedgerow creation.

The Codes have common features. They provide eligibility rules, specify how additionality is to be demonstrated, provide the validation methodology and the timescales over which the project should exist, and specify how and when tradeable carbon credits are available. Compliance with the codes is not a simple matter and anyone considering entering a scheme should take time to study the Codes and the implications, particularly those relating to change of ownership of the land over the course of the project and the risk of natural events, such as storms, diminishing the expected benefits. It is a feature of both Codes that the projects are expected to have relatively long duration, perhaps several decades. Entering a scheme generally involves a long-term commitment and disengagement part way through may prove difficult or expensive so such schemes are not to be entered into without careful appraisal of all the implications.

It will also be important to consider whether the carbon benefits arising from woodland creation and peatland restoration may require to be retained by the landlord or tenant to enable either of their businesses to demonstrate net carbon neutrality.

It should be noted that the schemes do not enable carbon credits to be obtained for simply owning peatland or woodland. Active peatland restoration or new woodland creation is required to be undertaken in order to be eligible for credits. Not all woodland creation or peatland restoration projects will necessarily be eligible for schemes under the codes.

4. Implications for Landlords and Tenants

A tenant or landlord wishing to acquire carbon credits from woodland creation or peatland restoration has constraints not experienced by an owner-occupier and arising from both the agricultural holdings legislation and the rules within the Woodland and Peatland Codes. These are considered in more detail below.

4.1. Peatland Restoration

The legislative position is that peatland restoration is not included in the definition of agriculture in the agriculture holdings legislation but, since 2003, 'conservation' activities (not defined in the legislation) are considered to be within the scope of the rules of good husbandry. This has allowed tenant farmers to engage in a range of conservation activities grant aided by Government without falling foul of the rules of good husbandry. It would seem logical, therefore, that peatland restoration, grant aided by Government, would qualify as a conservation activity which can be carried out by a tenant without the need for it to be treated as a diversification (non-agricultural) activity. Tenants should note, however, that an application for grant aid from NatureScot for peatland restoration must have the support of the landlord.

Peatland restoration is not able to be treated as a tenant's improvement eligible for compensation at waygo.

If a landlord wishes to resume land from a tenancy in order to carry out a peatland restoration project on land that is currently tenanted, that ability depends on the nature of the lease and its terms. In 1991 Act tenancies, if there is no written lease or no specific clause within a lease that permits resumption, the landlord has no right to resume. Where the landlord has a contractual right of resumption, the landlord may seek to resume the land but that is subject to challenge by the tenant if the resumption is contrary to the good faith of the lease and is of such a scale or nature that it will affect the likelihood that the farm can continue to be tenanted as an agricultural subject. In the case of 2003 Act tenancies (SLDT; LDT; MLDT), there is only power to resume land under section 17 of that Act, under which the landlord cannot resume land unless they obtain planning consent and give 12 months' notice. Under the Town and Country Planning (Scotland) Act 1997 (as amended) works relating to peatland restoration may require planning permission, and if that is granted, may allow a landlord to resume the area affected from a 2003 Act tenancy. Note, however, that most peatland schemes are unlikely to require planning permission.

The position with respect to **the rules of the Peatland Carbon Code** itself is somewhat clearer. If the land within the project area is under tenure, written consent must be obtained from the landowner, including agreement that the obligation for delivery of the project shall be transferred to the landowner should the tenancy end before conclusion of the project. A tenant cannot, therefore, seek to enter a peatland restoration scheme that will generate carbon credits without the consent of the landowner.

4.2. Woodland Creation

The legal definition of agriculture includes “the use of land for woodlands where that use is ancillary to the farming of the land for other agricultural purposes”. That would suggest that tenants are free to create small farm woodlands and shelterbelts without needing to seek the landlord’s consent for a diversification scheme.

For larger woodland projects, the 2003 Agricultural Holdings (Scotland) Act gave tenants the ability to create woodlands on their holding, and to benefit from future timber sales, but this is regarded as a non-agricultural (diversification) activity and the express consent of the landlord is required. Such woodland is not eligible to be treated as a tenant’s improvement but may qualify for compensation at the end of the lease under the diversification rules.

The landlord’s right to resume land for tree planting is as for peatland restoration. Resumption (where permitted by contract) in the case of a 1991 Act tenancy is subject to challenge by the tenant and there is no automatic right to resume land for tree planting in the case of a 2003 Act tenancy unless, unusually, the tree planting scheme itself required separate planning permission.

The rules of the Woodland Carbon Code expressly state that, where land is tenanted, the landowner shall also commit to the Woodland Carbon Code for the project duration and beyond. It is clear therefore that a tenant cannot enter into a woodland creation scheme on the holding which can be recognised under the Woodland Carbon Code without the consent of the landlord.

5. The Need for Agreement

It is clear that tenants cannot generally proceed without the agreement of the landlord and that landlords are limited in their ability to resume land without the agreement of the tenant. Given the potential benefits of peatland restoration and woodland creation schemes to landlord and tenant in many circumstances, there is ample incentive for the parties to get together to explore the possibility of entering into a contractual agreement that enables a project to proceed in a way that benefits both parties.

Where a landlord or tenant is considering the potential to generate carbon credits from woodland creation or peatland restoration on land subject to a 1991 or 2003 Act tenancy, it is recommended that the parties enter into a discussion to determine what type and scale of project, if any, would be acceptable to both parties. Thereafter, agreement will be needed on who is taking the lead in delivering the project and how responsibilities, costs and incomes are to be shared. Careful consideration of the conditions attached to the Codes is required to ensure that the rights and responsibilities of both parties are established and that the agreement is robust enough to meet the code conditions and to deal with future changes in landlord or tenant or in the event that the project doesn’t deliver the anticipated carbon benefits.

If agreement can be reached on all points, it is strongly recommended that the parties enter into a legal contract that binds both parties to respect the agreements made.



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