

3 March 2022

Committee Secretary
Senate Scrutiny of Delegated Legislation Committee
PO Box 6100
Parliament House
Canberra ACT 2600

L1 Endeavour House
1 Franklin Street
Manuka ACT 2603
+61 2 6130 0530
mail@australiainstitute.org.au
australiainstitute.org.au
ABN 90 061 969 284
ACN 061 969 284



Dear Senator Fierravanti-Wells

The Australia Institute writes to you in your capacity as Chair of the Senate Committee for the Scrutiny of Delegated Legislation concerning a recent determination.

On 8 September 2021, the Minister for Energy and Emissions Reduction made the *Carbon Credits (Carbon Farming Initiative—Electricity Generation from Landfill Gas) Methodology Determination 2021* (ERF landfill gas generation method) under the *Carbon Credits (Carbon Farming Initiative) Act 2011* (Cth) (CFI Act). The Australia Institute is concerned that the ERF landfill gas generation method was made to subvert a statutory prohibition contained in the CFI Act.

Emissions Reduction Fund (ERF) methods are delegated legislation that set out the rules for the development and issuance of Australian carbon credit units (ACCUs). ACCUs are a financial product intended to reflect 1 tonne of greenhouse gas abatement. ACCUs are purchased in biannual auctions held by the Clean Energy Regulator on behalf of the Australian Government and sold to private entities in the voluntary market.

To date, the abatement of methane (CH₄) emissions from solid waste landfills has been one of the most significant offset activities under the ERF. Landfill gas projects abate emissions by capturing landfill gas emitted from landfill sites and combusting the CH₄ using either a flare or an electricity generator. Reflecting this, there are two types of landfill gas projects: flaring-only projects, which capture landfill gas and combust it using a flare only (they do not generate electricity); and generation projects, which capture and combust landfill gas for electricity generation. Both are eligible to receive ACCUs under the ERF's landfill gas methods.

In 2018, the Emissions Reduction Assurance Committee (ERAC) – the body responsible for ensuring the integrity of ERF methods – undertook a review to determine whether the crediting period for both flaring-only and generation projects should be extended (a 'crediting period extension review'). The review

concluded that the crediting period for flaring-only projects should be extended because, in the absence of ACCUs, there would be insufficient incentive for these projects to continue to capture and combust the gas. In contrast, the ERAC concluded that the crediting period should not be extended for generation projects because:

Extending the crediting period for electricity generation projects is likely to result in the issuance of ACCUs for emissions reductions that would occur in the ordinary course of events. For existing electricity generation projects, in most cases, the revenues from the sale of electricity and LGCs are likely to cover the ongoing capital, operational and maintenance costs of the projects, including engine refurbishment costs. Due to this, it is likely that, in most instances, existing electricity generation projects will continue in the absence of the incentive provided by the Emissions Reduction Fund (ERF). Similarly, the available evidence indicates the extension of the crediting period is unlikely to promote new electricity generation projects that would not have otherwise occurred.

On this basis, the ERAC recommended that:

... the crediting period for electricity generation projects should not be extended. Extending the crediting period for electricity generation projects carries too great a risk of crediting abatement that is likely to occur in the ordinary course of events.

Acting on these recommendations, the original ERF method (formally the *Carbon Credits (Carbon Farming Initiative—Landfill Gas) Methodology Determination 2015*) was amended to provide flaring-only projects with a 5 year extension to their original 7-year crediting period (i.e. a total of 12 years). The crediting period for generation projects was left at 7 years, consistent with the ERAC's recommendation.

The ERAC's recommendation that generation projects not receive an crediting period extension should have ensured that generation projects that were registered under the original ERF method received one 7-year crediting period only. This is a product of section 114(7A) of the CFI Act, which provides that:

The Minister must not vary a methodology determination so as to extend the crediting periods for the eligible offsets projects covered by the determination unless:

- a) *the Emissions Reduction Assurance Committee has advised the Minister under subsection 123A(2) or paragraph 255(hc) that the variation should be made; and*
- b) *the Emissions Reduction Assurance Committee **has not previously advised the Minister under subsection 123A(2) or paragraph 255(hc) that the variation should not be made; and***

c) *the determination has not previously been varied so as to extend the crediting periods.* [Emphasis added]

The effect of section 114(7A) is to make the ERAC's determination final. Once the ERAC has recommended that the crediting period of a method should not be extended, the Minister *cannot* vary the method to extend the crediting period, even if the ERAC subsequently changes its mind.

However, a decision appears to have been made to provide generation projects with a crediting period extension, contrary to the ERAC's 2018 recommendation and section 114(7A) of the CFI Act. Because the original method could not be amended to include this extension, an entirely new method was made (the ERF landfill gas generation method). The ERF landfill gas generation method is almost the same as the original ERF landfill gas method. The only material difference between the two methods is that the ERF landfill gas generation method grants generation projects 12-year credit periods, while generation projects only receive 7-year crediting periods under the original ERF landfill gas method.

If the ERF landfill gas generation method is allowed to stand, the generation projects currently registered under the original ERF landfill gas method will be able to transition across to the new ERF landfill gas generation method, thereby allowing them to receive the 5-year extension to their crediting period that the ERAC advised should not be granted.

The Senate should not allow delegated legislation to be made in circumstances where the sole aim of the instrument is to subvert a prohibition contained in the enabling legislation.

The Australia Institute asks the Committee to consider *Carbon Credits (Carbon Farming Initiative—Electricity Generation from Landfill Gas) Methodology Determination 2021* in this light.

Yours sincerely

Richie Merzian
Climate & Energy Program Director
The Australia Institute



AUSTRALIAN
SENATE

Senate Standing Committee for the
Scrutiny of Delegated Legislation

Parliament House, Canberra ACT 2600
02 6277 3066 | sdlc.sen@aph.gov.au
www.aph.gov.au/senate_sdlc

22 March 2022

Mr Richie Merzian
Climate and Energy Program Director
The Australia Institute
L1 Endeavour House
1 Franklin Street
MANUKA ACT 2603

Via email: richie@australiainstitute.org.au

CC: polly@australiainstitute.org.au

Dear Mr Merzian,

Carbon Credits (Carbon Farming Initiative—Electricity Generation from Landfill Gas) Methodology Determination 2021 [F2021L01254]

Thank you for your letter of 3 March 2022 to the Senate Standing Committee for the Scrutiny of Delegated Legislation regarding the above instrument.

The committee has carefully considered the instrument against the scrutiny principles outlined in Senate standing order 23. Following this consideration, the committee has formed the view that instrument does not raise technical scrutiny concerns under these principles. This is because the committee considers that the instrument has been, as a matter of law, validly made under subsection 106(1) of the *Carbon Credits (Carbon Farming Initiative) Act 2011*. In this regard, the committee is limited to considering the technical compliance of an instrument with its scrutiny principles, rather than any broader considerations.

However, the committee has resolved to publish your correspondence and this response on the committee's website. Furthermore, the committee has determined that the instrument engages Senate standing order 23(4), which provides that:

The committee shall also scrutinise each instrument to determine whether the attention of the Senate should be drawn to the instrument on the ground that it raises significant issues, or otherwise gives rise to issues that are likely to be of interest to the Senate

Accordingly, I have written to the Chair of the Senate Environment and Communications Legislation Committee to draw the instrument to the attention of that committee. Please find **attached** for your information a copy of that letter.

Should you have any questions please contact the committee's secretariat on (02) 6277 3066, or by email to sdlc.sen@aph.gov.au.

Thank you again for bringing this matter to the attention of the committee.

Yours sincerely,

Senator the Hon Concetta Fierravanti-Wells

Chair

Senate Standing Committee for the Scrutiny of Delegated Legislation



11 March 2022

Senator Andrew Bragg
Chair
Senate Environment and Communications Legislation Committee
Parliament House
CANBERRA ACT 2600

via email: ec.sen@aph.gov.au

Dear Chair,

Matters of interest to the Senate—Carbon Credits (Carbon Farming Initiative—Electricity Generation from Landfill Gas) Methodology Determination 2021 [F2021L01254]

I write on behalf of the Senate Standing Committee for the Scrutiny of Delegated Legislation (the committee) which assesses legislative instruments against the scrutiny principles outlined in Senate standing order 23.

Standing order 23(4) requires the committee to scrutinise each instrument to determine whether the attention of the Senate should be drawn to the instrument on the ground that it raises significant issues or otherwise gives rise to issues that are likely to be of interest to the Senate. These may include instruments which contain significant policy matters or significant elements of a regulatory scheme, instruments which amend primary legislation, and instruments which have a significant impact on personal rights and liberties.

Noting that the following instrument appears to contain significant policy matters relating to offsets projects for the purposes of the Emissions Reduction Fund, the committee has determined that the instrument engages standing order 23(4) and accordingly has resolved to draw it to the attention of your committee:

Instrument	Purpose	Last day to lodge disallowance notice
Carbon Credits (Carbon Farming Initiative—Electricity Generation from Landfill Gas) Methodology Determination 2021 [F2021L01254]	<p>To set out the methodology to earn carbon credits for emissions reductions achieved from the capture and combustion of landfill gas generated from decomposing waste.</p> <p>The Determination credits emissions reductions achieved through the destruction of methane from decomposing waste at a landfill site where the landfill operator intends to generate electricity. Organic waste produces methane when decomposing under anaerobic conditions, such as in landfill. Methane is a greenhouse gas 28 times more potent than carbon dioxide over a 100-year period.</p>	29 March 2022

Instrument	Purpose	Last day to lodge disallowance notice
	Capturing and combusting waste methane converts the methane into carbon dioxide, reducing net emissions from landfills. The Determination covers landfill projects that intend to generate electricity from combusting landfill gas, either exclusively or in conjunction with flaring.	

Should your committee decide to further examine the above instrument, I note that the table above identifies the last day (based on the current sitting pattern) for lodging a disallowance notice in the Senate.

The committee has also received correspondence from the Australia Institute regarding the above instrument. The committee has resolved to publish this letter and a copy is **attached** for the information of your committee.

Further details about the instrument are published on the Federal Register of Legislation at <https://www.legislation.gov.au/>.

Please note that in the interests of transparency this correspondence will be published on the Scrutiny of Delegated Legislation Committee's website.

Should you have any questions please contact the committee's secretariat on (02) 6277 3066, or by email to sdlc.sen@aph.gov.au.

Yours sincerely,

Senator the Hon Concetta Fierravanti-Wells
Chair
Senate Standing Committee for the Scrutiny of Delegated Legislation