



australian network of environmental defender's offices

Submission on the Positive and Negative Lists for the Carbon Farming Initiative

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The Australian Network of Environmental Defender's Offices (**ANEDO**) consists of nine independently constituted and managed community environmental law centres located in each State and Territory of Australia.

Each EDO is dedicated to protecting the environment in the public interest. EDOs provide legal representation and advice, take an active role in environmental law reform and policy formulation, and offer a significant education program designed to facilitate public participation in environmental decision making.

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Introduction

ANEDO welcomes the opportunity to make a submission on the development of the positive and negative lists. These lists are two of the most important components of the Carbon Farming Initiative (CFI).

ANEDO has previously expressed concern about the positive list and the negative list, preferring other mechanisms for ensuring additionality and preventing negative impacts. However, in light of the Government's decision to pursue the positive and negative list, we have taken a pragmatic approach to engaging in their development. Many of the concerns that ANEDO had with these mechanisms can be mitigated or reduced by taking a careful and sensible approach to their design and implementation.

Our recommendations for doing that are set out in detail below, under the following headings:

- 1 The Positive List
 - 1.1 Minimising the risks of using a positive list
 - 1.2 Narrowly define common practice
 - 1.3 Define activities in a sophisticated way, to maximise additionality
 - 1.4 Create a transparent, open and accountable process for building the list
- 2 The Negative List
 - 2.1 Minimising the risks of using a negative list
 - 2.2 Require the Minister to take a cautious and evidence-based approach
 - 2.3 Define excluded activities to give them maximum accuracy and reach
 - 2.4 Create a transparent, open and accountable process for building the list

As a network of environmental lawyers, it is outside ANEDO's expertise to comment on the specific activities that should be included on the positive or negative list. We will limit our submissions to just two of the headings in the template submission — the format of the lists, and the process for nominating activities for inclusion on the list. Our focus will, as always, be to ensure that the law works to protect the environment in the public interest.

We are very happy to discuss our submission in more detail, and to contribute further to the development of the CFI. Please do not hesitate to contact Michael Power, Lawyer - Law Reform (EDO Vic) on michael.power@edo.org.au or (03) 8341 3100.

Summary of Recommendations

1. The Positive List

1.1 Minimising the risks of using a positive list

- The Government should recognise the risks of using a ‘positive list’, and make sure that the design of that list minimises those risks as much as possible.

1.2 Narrowly define common practice

- Define ‘common practice’ narrowly, to minimise the extent to which ongoing non-additional activities can receive credits
- Define ‘common practice’ to limit the positive list to activities which are practised by a very small minority of people in a given industry or environment.

1.3 Define activities in a sophisticated way, to maximise additionality

- Use specific, qualified definitions of positive list activities, to maximise accuracy and business certainty. The activity in the Consultation Paper, “[e]stablishment of permanent environmental (mixed native species) forest greater than 1 ha after 1 July 2007”, is a good example of this.
- Avoid blanket definitions like “culling of feral camels”.

1.4 Create a transparent, open and accountable process for building the list

- Ensure that the public has the right to scrutinise and comment on additions to the positive list.

2. The Negative List

2.1 Minimising the risks of using a negative list

- Recognise the value of a well-designed negative list, and make it as thorough and comprehensive as possible.

2.2 Require the Minister to take a cautious and evidence-based approach

- Require the Minister to act consistently with the advice of the DOIC in building the negative list.
- Require the Minister to act consistently with the precautionary principle in building the negative list.

2.3 Define excluded activities to give them maximum accuracy and reach

- Define the excluded activities in a sophisticated and comprehensive way, by including qualifications. For example, “a plantation forest in a water catchment that is likely to seriously threatens water quality or supply” or “a plantation forest in a water catchment that the Administrator decides seriously threatens water quality or supply.”

2.4 Create a transparent, open and accountable process for building the list

- The public should be given the right to nominate activities to the negative list, for consideration by the DOIC and the Minister.

1. The Positive List

1.1 Minimising the risks of using a positive list

In earlier submissions, ANEDO submitted that the positive list was inadequate and that a case-by-case method of assessing additionality should be preferred. We took that view because the positive list is inherently unable to ensure that offsets projects are additional. By listing activities that are *generally* additional, and deeming any project which fits that category to be additional, the positive list actually gives up on additionality. It abdicates the task of ensuring that projects are *in fact* additional, and settles for an educated guess.

How accurate that guess will be is an open question. It is reasonable to assume that projects which have been conducting a positive list activity for some time (i.e. a non-additional project) will be in a better position to apply for offset credits than those projects that are just starting their activity (i.e. additional projects). For example, if the positive list includes ‘culling of feral animals’, then we can expect those people who have been doing this for years to be the first to apply for credits.

Even if the number of non-additional projects is only small, they could be enough to undermine confidence in the CFI. The ‘close enough is good enough’ approach adopted by the positive list has its merits. But even a few cases of non-additional projects can lead to scandal if they are blatantly non-additional and highly publicised by environment groups and the media. The experience with other offset schemes overseas has borne this out,¹ and closer to home, the Home Insulation Program shows how badly a few highly publicised cases can damage an otherwise credible scheme. Even just two or three cases of non-additional offsets can be enough to damage public perceptions of the environmental and commercial integrity of the CFI, and undermine market demand for offset credits.

It is therefore important that the Government keep a close eye on these risks, and minimise them as much as possible. The positive list will always allow some non-additional projects to receive credits, but how well it is designed will determine exactly how many of those projects will be allowed. A carefully and sensibly designed positive list can make the difference between a CFI that is ‘mostly’ additional, and a CFI that is ‘overwhelmingly’ or ‘practically all’ additional.

Recommendation:

- The Government should recognise the risks of using a ‘positive list’, and make sure that the design of that list minimises those risks as much as possible.

The following recommendations explain how to do that.

¹ For example, significant concerns have been raised about additionality (or the lack thereof) of projects under the Chicago Climate Exchange: see James Murray, ‘Study raises concerns over Chicago Climate Exchange offsets’, *Business Green*, 9 April 2008. On 20 October 2008, *Wall Street Journal* reporter Jeffrey Ball reported that landfill operators across the USA were selling offsets for methane capture projects that had been ongoing for years: Charles W Schmidt, ‘Carbon Offsets: growing pains in a growing market’ (2009) 117(2) *Environews Focus* A62. High profile cases like this brought the entire CCX into disrepute.

1.2 Narrowly define ‘common practice’

The touchstone of additionality under the legislation is ‘common practice’. Whether or not the Minister includes an activity on the positive list is to be determined with regard to whether or not it is beyond common practice in the relevant industry or environment. Common practice is a sensible standard to apply, but it could mean many different things. For example, to say that a particular activity is ‘not common practice’ could mean that only 5% of farmers are doing it, or that only 40% of farmers are doing it. Obviously, the 35% between these two meanings makes a big difference to the effectiveness of the CFI, because once the category of activity is deemed to be additional, anybody can claim offset credits for doing it — even if they’ve been doing it for years already.

It is very important that ‘not common practice’ means only a very small proportion of people are already doing the activity — more like 5% than 40%. We understand that the Department will release common practice guidelines to flesh out the meaning of common practice (which is not defined in the legislation). Those guidelines should narrowly define what is ‘not common practice’. They should specifically provide that, generally, an activity which is already being practiced by more than a very small minority of people in that industry or environment (10%, for example) will not meet the definition of ‘not common practice’.

The above approach may cause frustration in that it excludes those activities where 40% of people are already taking action, but 60% of the people are still waiting for an incentive to act. However, declaring these activities to be ‘not common practice’ will entitle all 40% of farmers already practising the activity to claim offset credits for things they were already doing, allowing double-counting and creating false credits. It is also unlikely to drive the remaining 60% of farmers — the people who will be first to claim offset credits for their activities are likely to be those 40% of farmers who are already well-established in their abatement activities. It is understandable that these ‘early movers’ want a subsidy for the continuation of their abatement activities; but offset credits which allow other people to avoid reducing their emissions are a very bad way to provide that subsidy.

Recommendations:

- Define ‘common practice’ narrowly, to minimise the extent to which ongoing non-additional activities can receive credits.
- Define ‘common practice’ to limit the positive list to activities which are practised by a very small minority of people in a given industry or environment.

1.3 Use sophisticated activity definitions to maximise additionality

The additionality test in the legislation refers to common practice in “the relevant industry or the relevant part of the relevant industry; or the kind of environment in which such a project is to be carried out.” The industry or environment for any given activity can be defined at various levels of abstraction — from ‘agriculture’ and ‘forestry’, to ‘Queensland beef cattle industry’ and ‘Tasmanian native forest wood-chipping industry’.

This ability to define the relevant industry or environment at a higher or lower level of specificity is an important and very useful tool to ensure that an activity is truly ‘not common practice’. The Consultation Paper seems to recognise this when it says that the test “involves comparing farmers who are operating in similar environments or with similar access to information, skills and technologies. This allows ‘apples to be compared with apples.’”²

In our view, the same facility should be used to minimise the number of non-additional projects that are eligible for offset credits. The activities on the positive list should be defined with a high degree of specificity, to exclude non-additional projects as much as possible. The illustrative example in the Consultation Paper, “[e]stablishment of permanent environmental (mixed native species) forest greater than 1 ha after 1 July 2007” is a good example of an activity that has been specifically and carefully defined to maximise additionality. Conversely, blanket categories like “[c]ulling of feral camels” should be avoided, and qualified so as to exclude as much as possible cases where this would have occurred without the CFI.

The more specific and qualified the categories, the more accurate they will be in capturing additional projects and excluding non-additional projects. They will also assist prospective project proponents by giving them a clearer idea of the requirements of the positive list, and providing greater business certainty.

Recommendation:

- Use specific, qualified definitions of positive list activities, to maximise accuracy and business certainty. The activity in the Consultation Paper, “[e]stablishment of permanent environmental (mixed native species) forest greater than 1 ha after 1 July 2007”, is a good example of this.
- Avoid blanket definitions like “culling of feral camels”.

1.4 Create a transparent, open and accountable process for building the list

It is important that the public have a chance to scrutinise and comment on additions to the positive list. The process of making additions needs to be conducted entirely in public, with nominations, advice and reasons published and the community given an opportunity to contribute.

It is not clear whether this will happen under the process as currently proposed. The Consultation Paper says that stakeholders will have a chance to comment on additions to the positive or negative lists at the same time as commenting on whether or not a particular methodology should be approved.

We have no objection to conducting public consultation on additions to the positive list at the same time as consultation on the approval or non-approval of methodologies. However, if this is going to be the designated time for public consultation and comment, then specific proposals for addition to the positive and negative list must be made available to allow full and informed comment.

² Department of Climate Change, *Consultation Paper: Positive and Negative Lists for the Carbon Farming Initiative*, p 2.

Moreover, there will be occasions where additions to (or removals from) the positive list will be made separate from any process of methodology consultation and approval. It is important that the public has a chance to scrutinise and comment on these additions. The Government must ensure that this opportunity is provided, even if it is just a short 10 day consultation period.

The right to scrutinise and comment on additions to the positive list should preferably be enshrined in the legislation, but if that is not possible, included in the regulations.

Recommendations:

- Ensure that the public has the right to scrutinise and comment on additions to the positive list.

2. The Negative List

2.1 Minimising the risks of using a negative list

The negative list is laudable in its commitment to avoiding any negative environmental or social side-effects of the CFI. It is vital to the credibility and public acceptance of the CFI that it achieves that objective. In previous submissions, ANEDO argued that a general test of ‘environmental sustainability’ was preferable to a negative list of excluded offset projects. We did so because a general test avoids many of the weaknesses of a negative list.

A general test is more comprehensive than a negative list which, no matter how long it is, will always leave out some activities with adverse environmental or other impacts. A general test is more able to deal with new and unforeseen circumstances, which may not be caught by a negative list. A general test does not rely on Ministerial discretion, whereas a negative list is only as effective as a Minister makes it. However, all of these problems can be greatly reduced if the negative list is compiled in a comprehensive, diligent, sophisticated manner.

Recommendations:

- Recognise the value of a well-designed negative list, and make it as thorough and comprehensive as possible.

The following recommendations suggest some ways to do that.

2.2 Require the Minister to take a cautious and evidence-based approach

The Minister’s decision whether or not to include activities on the negative list must be informed by independent, technical analysis. At present, the legislation only requires the Minister to “have regard to whether there is a significant risk that that kind of project will have a significant adverse impact on” the environment or communities. There is no requirement for the Minister to seek advice on that risk, and at any rate the Minister must only ‘have regard to’ it.

The Minister’s decision to add or refuse to add activities to the negative list should be based on the advice of the Domestic Offsets Integrity Committee (**DOIC**), the same way that the decision to add things to the positive list is. The Minister must decide consistently with the advice of the DOIC — or at the very least, have regard to it. This will bring independence and technical scientific and regulatory expertise to the task. To the extent necessary, the DOIC can seek advice from the Department or other departments on questions of economics.

The Minister’s decision should be governed by the need to exercise caution. The negative list is premised on the need to preserve the credibility of and public support for the CFI by taking a cautious approach to certain projects which may have unintended adverse impacts. The activities on the negative list, and the process of adding activities to the negative list, should reflect that. It should be made clear that the Minister does not need to be certain that an activity will have an adverse impact before adding it to the negative list. The best way to do that is to require the Minister to exercise the precautionary principle in deciding whether to add things to the negative list: “where there are threats of serious or irreversible environmental damage, lack of full scientific certainty should not be used as a reason for postponing measures to prevent environmental degradation”.

The best way to implement these restrictions is by amending the legislation, to make these procedures and considerations mandatory. If that is not possible, then they could be included in administrative guidelines which guide the Minister’s decision.

Recommendations:

- Require the Minister to act consistently with the advice of the DOIC in building the negative list.
- Require the Minister to act consistently with the precautionary principle in building the negative list.

2.3 Define excluded activities to give them maximum accuracy and reach

The specificity with which excluded activities are defined will be crucial to the success or failure of the negative list. Definitions must not needlessly be too broad (although it is better that they be too broad than too narrow). If it is to maintain public confidence and political support, the CFI must not facilitate unintended negative consequences. In many cases, therefore, blanket exclusions like the example given by the Consultation Paper — “[e]stablishment of forest as part of a Managed Investment Scheme” — will be appropriate.

But adroit qualifications will also be necessary. These qualifications can be objective in cases where a particular feature can be identified that would make projects *prima facie* inappropriate: for example, the “[e]stablishment of vegetation on land cleared of native vegetation (other than weeds) since 1 July 2007 or within three years of project commencement (whichever is more recent).”.

Subjective qualifications could also be extremely useful. No examples of these are included in the Consultation Paper, but they could be a useful way to make the negative list more comprehensive without unintentionally excluding worthy projects through blanket prohibitions. An example of such a qualification might be: “a plantation forest in

a water catchment that is likely to seriously threaten the water supply”, or “a plantation forest in a water catchment that the Administrator decides is likely to seriously threaten the water supply”. These qualifications reserve some assessment of each project, allowing a greater degree of sophistication and dexterity in excluding projects from the CFI.

Recommendations:

- Define the excluded activities in a sophisticated and comprehensive way, by including qualifications. For example, “a plantation forest in a water catchment that is likely to seriously threatens water quality or supply” or “a plantation forest in a water catchment that the Administrator decides seriously threatens water quality or supply.”

2.4 Create a transparent, open and accountable process for building the list

If the negative list is designed to protect the public and their environment from unintended adverse impacts, it seems reasonable to allow the public to have a say in how the list is made. Yet at present, the Consultation Paper gives no indication that the public will be consulted on specific additions to the negative list.

The current consultation, though welcome, is not sufficient to ensure that stakeholders’ concerns are captured by the negative list. After all, it is difficult for stakeholders to know what unintended adverse consequences the CFI will have before it is even passed through Parliament. Some process for ensuring ongoing public consultation on the development of the list is required.

The CFI should allow the public to nominate activities for inclusion on the negative list on an ongoing basis. This would be best achieved by amending the legislation to give the public the right to nominate an activity to the DOIC. The DOIC would then be obliged to advise the Minister as to the inclusion or non-inclusion of the activity, and the Minister would then be obliged to make a decision based on that advice. This sort of facility is the best way to ensure that the negative list and the CFI as a whole capture community concerns on an ongoing basis — which is, after all, the purpose of the negative list.

If legislative amendment is not possible, some administrative arrangement to the same effect should be implemented.

Recommendations:

- The public should be given the right to nominate activities to the negative list, for consideration by the DOIC and the Minister.

For more information in relation to this submission please contact Michael Power, Lawyer – Law Reform (EDO Vic), on Michael.power@edo.org.au or (03) 8341 3100.