

Farmers' Guide to Carbon Market Contracts

Webinar

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I. Introduction

This webinar is designed to help farmers understand carbon contracts and make an informed decision about whether to agree to a carbon contract. In doing so, the webinar focuses on contract language and the meaning of that language. The webinar, therefore, does not look at whether any particular contract is a good deal. Instead, the aim is for farmers to have information they need to evaluate risk and make an informed decision about a carbon contract.

II. The Approach of This Webinar

The webinar does two main things.

A. Carbon Capture and Carbon Markets

The webinar discusses very briefly the current market for carbon contracts and in particular some of the aspects of these markets that can become important for the contract terms.

B. Farmer Perspective

The webinar looks at carbon contracts from the viewpoint of a farmer that is considering such a contract. Carbon contracts will be suitable for some farmers, likely not for others. The farmer perspective, however, looks to assess the meaning of the contracts, and in particular how they assign risk in the agreement.

C. Contract Language

The focus in this webinar is carbon contract language.

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(1) Actual Contracts

The quotes all come from actual contracts, but the materials do not say any quote is from a particular contract.

(2) No “Best” Contract

The goal is not to pick the “best” contract available at the moment, so we do not need to compare and contrast each contract looking for the best terms. There likely is no such thing as the best contract for all farmers. And if there was, the situation could change as the contracts are changed over time.

(3) Basic Terms

Understanding the basic terms that appear in many contracts, however, can help farmers understand what they are signing. Each farmer needs to look at the contract in front of the farmer and decide if it makes sense for the farmer.

D. Question and Comments

We will leave time for questions and comments.

III. The Logic of Carbon Contracts and a Comment on Carbon Markets

There are many good sources that explain the science of carbon capture, how carbon markets came to be, and quite a bit of writing discussing the entire industry. A few selected sources are especially helpful.²

A. Managing Risk for Farmers a Focus

This webinar does not take a view on whether carbon markets for farmers are a good thing or not, and certainly not on whether any particular contract is a good option for a particular farmer. That said, a few

² For the science, see National Academies of Science, Engineering, and Medicine, Negative Technologies and Reliable Sequestration: A Research Agenda, 1-44, 247-318 (2019), at <https://nap.nationalacademies.org/catalog/25259/negative-emissions-technologies-and-reliable-sequestration-a-research-agenda>; Lisa Schulte Moore and Jim Jordahl (eds.), Carbon Science for Carbon Markets: Merging Opportunities in Iowa, CROP 3175, Iowa State University (2022), at <https://store.extension.iastate.edu/product/Carbon-Science-for-Carbon-Markets-Emerging-Opportunities-in-Iowa>.

For markets see, See, for example, Oranuch Wongpiyabovorn et al., Challenges to Voluntary Ag Carbon Markets, Applied Economic Perspectives and Policy 1, 2 (2022), at <https://doi.org/10.1002/aep.13254>; Wongpiyabovorn; Amy Ando et al., The Achilles Heels of Carbon Farming: Operational Constraints on the Next Cash Crop (2022), at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4166379; Sarah Sellars et al., Weekly Farm Economics: What Questions Farmers Should Ask About Selling Carbon Credits, farmdoc daily, 2-4 (April 13, 2021), at <https://farmdocdaily.illinois.edu/2021/04/what-questions-should-farmers-ask-about-selling-carbon-credits.html>; Alejandro Plastina, How Do Data and Payments Flow Through Ag Carbon Programs?, Ag Decision Maker, File A1-77 (2022), at <https://www.extension.iastate.edu/agdm/crops/pdf/a1-77.pdf>; Ben Lilliston, Lessons for the EU’s Carbon Plans, IATP (June 16, 2022), at <https://www.iatp.org/documents/lessons-eus-carbon-farming-plans>.

background points about these markets are helpful for understanding how the markets work and what the contracts are intended to accomplish.

B. The Logic of Carbon Markets

Although carbon markets for agriculture have been discussed for some time, the logic of them can be puzzling. The following sections describe briefly the thinking behind them.

(1) “Carbon Neutral” Means Carbon Credits

Many very large corporations claim that their activities are “carbon neutral.” Often, these firms increase the use of renewable energy or make other changes to corporate practices. These are sometimes called “insets” (as opposed to carbon offsets). Frequently, however, they also purchase what are called carbon credits.

A carbon credit certifies that someone—in our case a farmer—took certain actions that captured carbon and received a payment for that action. The farmer, in other words, acted to capture carbon under a contract, and was paid for creating a carbon credit under that contract. That carbon credit is then ultimately sold to the large business. In the end the large business has offset some of its greenhouse gas emissions by paying, indirectly, for a farmer to capture carbon. This market is for carbon credits. The farmer is ultimately the creator of the credit by capturing carbon, and the large business entity is the buyer. In theory these actions make up for emissions that the business cannot or does not wish to cut from its own operations.

(2) Private Market, Not Regulation

While some governments have required a form of offsets that drive these markets, a very substantial source of the markets is the willingness of businesses to buy carbon credits without a government requirement. By all accounts, these efforts are increasing.

C. Multiple Players in Carbon Contracts

Large businesses hoping to claim they are carbon neutral do not contract directly with farmers or others that are sequestering carbon. Instead, there are a number of layers to the business of buying and selling carbon credits.

A single business can take on more than one of the following roles.

(1) Buyers

In a typical contract presented to a farmer, the business offering the contract is offering to sell the carbon credits produced by the farmer in a carbon market. They are not actually buying the carbon credit, as it is called, and selling it directly to the large business that wants to be carbon neutral.

(2) Market Creator

Sometimes the buyer is also the entity that is setting up the carbon market where the credit will be sold.

(3) Verifications

There are organizations or entities that—in theory—make sure the farmer carries out the farmer's end of the bargain by adopting new practices and carrying out other actions that make sure the carbon is actually sequestered. This is sometimes called verification.

(4) Quantify Capture

There is also often a firm that makes calculations that estimate how much carbon is sequestered.

(5) Ultimate Buyers

As noted above, the ultimate purchaser of a carbon credit is likely a large corporation.

(6) Many Actors

Like many other markets, in other words, there are many steps, many players, and many fingers in the pie.

The importance of this point is discussed more below, but for now it is worth noting that if any of these businesses fail in their job, go out of business, and so forth there is a risk of loss for someone in the chain of businesses. Farmers need to understand where they stand if something goes haywire in the functioning of these markets.

D. Carbon Markets are a Bit of a Free for All

At present carbon markets largely are not regulated.

(1) Standards

There are not uniform standards as to what might be considered a carbon credit. Some of these issues are discussed below. For now, though, it is worth noting that in these markets there are few rules or uniform standards.

(2) Normal Farming Standards

In the normal world of farming, when farmers sell their production, they can usually rely on a standard set of rules, and these rules, including how they are carried out, are fairly uniform. For example, corn growers have a good idea of how moisture in corn is measured and the effects of moisture levels on the price per bushel. Grading, for example, is very specific and essentially knowable and uniform.

Basic measurements rules are well known and essentially uniform around the country. A bushel of soybeans is sixty pounds, a bushel of shelled corn is fifty-six pounds, and so on. For livestock, scales and weighing are regulated. Further, grades and standards for many commodities are regulated at a very specific level. Organic production, perhaps in some ways similar to carbon capture farming, has a firm and recognized set of rules that apply to anyone that wishes to claim production is organic. These systems are far from perfect, but they tend to create an understood baseline for measuring what is produced by the farmer.

(3) Carbon Markets

For carbon markets, however, there is no parallel system. There is no USDA certification for carbon capture practices, no regulatory system that sets what the standards should be for measuring carbon capture, and no non-governmental voluntary standard for either certification or measurement. This does not make carbon markets unworkable, but it is different from what most farmers are used to using.

Effective private watchdogs that create standards for the industry may be emerging. One is called Voluntary Carbon Markets Integrity (VCMI) Initiative. It is proposing a trial code that is designed to test the credibility of corporate net-zero claims tied to the use of offsets.

(4) Farmer Attention

For now, though, farmers should be cautious about contracts and how important aspects of the contract—compliance, payment, and so forth—are measured and who is doing the measuring.

E. Market for Carbon Credits Fluctuates

In a carbon contract a farmer is basically selling what has come to be called a carbon credit. There is a market, therefore, for carbon credits. Like any other commodity, the market can move up or down.

(1) Big Buyers

The vast majority of the market for carbon credits comes from large businesses. A small part of that demand is based on government regulation. It is possible that Delta Airlines, to just pick one example, may be less willing to pay for carbon credits in the future than they are now. Or, they might be willing to pay more, or the same. No one knows.

(2) Government?

Similarly, it is possible that the role of government in the market for carbon could change. Government's role in markets could be substantial. Federal policy mandating ethanol production from corn, for example, plays a substantial role in the ongoing price for corn. As with the market in general, policy changes could push the carbon market prices up or down. Certainly there are efforts to increase the role of the federal government in these markets. No one knows, it must be emphasized, if that will happen, and if it does happen what form it will take, how it will change markets for carbon, and how stable such a set of policies might be. Again, no one knows for sure.

(3) Carbon Price Volatility?

The point of this emphasis on the market nature of carbon credits is that the market price for carbon credits can change at any time. This is true for all commodities, of course, but some commodities seem to have greater shifts over time than others. And, even when a market seems steady, it can suddenly become volatile. There are a number of ways to measure volatility in a market, and ways that people use to try to predict future volatility. There is reason to believe that carbon markets might be especially volatile. We know, for example, that the Chicago Climate Exchange closed in 2010 after seven years of little activity. We know, as well, that the shape and structure of the carbon markets—who is involved, the techniques they use, the various roles they play—is fluid and changing.

All this suggests that it is important to know the price of the carbon credit the farmer is selling—or at least know how that price will be set. It is perfectly legal to create a contract for which the payment price of the contract can change as conditions change. Many credit cards, to use a common example, have what are often called variable interest rates. For carbon credit contracts it is important to know when prices are locked in, when they can change, and what makes them change.

Farmers are used to uncertainty. As with every other risk faced by farmers it is important to understand the risk as much as possible, and to know how much the farmer is risking. Carbon contracts are no different. As will be noted below, an important question is who bears the risk in carbon contracts and how.

IV. Contracts in General: The Writing in the Contract

Contracts of various forms have long been used in agriculture. Carbon contracts resemble contracts used by farmers in some ways, and in other ways are different. It makes sense, therefore, to briefly review some of the important aspects of contract law that affect carbon contracts.

A. Contract Defined

A contract is a promise that carries with it a legal obligation. While many important rules govern contract law, for this discussion one point is central: the document itself is crucial.

B. Writing Controls

That is, from a legal point of view, for these and other contracts, in general the language of the contract itself is what controls and what is enforceable in court.

There are some exceptions to this rule. A written agreement that calls for parties to break the law is not enforceable. Further, if parties carry out an unwritten contract, courts can conclude that there was a real and enforceable contract. Based on general contract law in the various states, and on the contracts themselves, for the carbon contracts in our discussion, the writing in the contract is what counts.

This has important implications for carbon and other contracts.

C. Negotiating

If a farmer would like to see changes in the contract before it is signed, this is certainly possible. From a legal point of view, the original contract is an offer, and the farmer can make a counteroffer. The other party can agree or not. This can be done quite simply by making written changes in the contract. Both parties need to sign off on those changes. If the farmer makes a change in the contract, it is probably also a good idea to initial the changes. This negotiating possibility sounds good, but in most carbon contract cases the other party is not likely to agree.

D. Contract of Adhesion

The carbon sequestration contracts are what lawyers sometimes call “contracts of adhesion.” That means that one party drafts the entire contract, presents it to another party, and requires the other party to agree with all terms as written or there is no agreement. This take it or leave it type of contract is legal and enforceable. There is no rule that says a party must negotiate any changes to a potential

contract. The point here is that it is likely that the carbon contract presented to a farmer is a take it or leave it offer. In theory, terms could change, but there may well be no room for negotiation.

E. Whole Agreement

The key point for the farmer to remember with a carbon contract is that in almost every case the written contract is the whole agreement.

When such a contract is discussed, there are often other promotional materials that are presented to the farmer. The promotional materials may be easier to understand and may be more appealing in the description of terms than the contract itself. It cannot be emphasized enough that unless other written materials are expressly included in the contract, by the contract itself, these other materials are not part of the agreement.

So, if a description of how payments are made is included in the contract as an appendix, it becomes part of the agreement; if it is not incorporated into the contract, by the terms of the contract, it has no legal weight.

The same is true for anything communicated verbally by a representative of the other party. If the representative tells the farmer, “Do not worry about this section of the contract, that is just boilerplate,” that comment is overwhelmingly likely not to be enforceable.

There is a tiny bit of wiggle room in the law on this point. In general, it only works if one party acts on and relies on something that was said or written that was not part of the final contract. The other party must know that the first party relied on this contract term and did not act to let the first party know to stop acting on the contract. This is a difficult thing to show. No farmer should ever rely on this possible exception to the general rule: the written contract is what is binding. Other written or spoken promises do not count.

F. Duty to Read Contract

With some exceptions, a party to an executed contract cannot avoid its terms because they failed to read the entirety of the agreement or thought the terms were different.

This rule can be important for carbon contracts, which tend to be quite long. It is therefore important that any farmer entering into a carbon agreement be sure they have read—and understand—every aspect of the agreement.

G. Default

In general, state law does not govern what constitutes a default. Instead, in most cases the contract itself will define what counts as a default. Examples from actual carbon contracts showing what situations can lead to a default can be found later in this webinar.

IV. Actual Language from Carbon Contracts

All of the quoted contract language below comes from actual contracts. The names of specific firms are redacted as is other information that might make identifying a party possible.

In the contracts, various language is used for the businesses buying the carbon credit service from a farmer. In the quoted parts of the contracts below, such businesses are called a Buyer.

In the contracts various language is used to describe the farmers that are selling the carbon contract service. Sometimes the farmer is referred to as the “Supplier.” In the sections quoted below the farmer is referred to as simply the Farmer.

Any time the language cited below is not identical to that in the contract, there are brackets around the substitute word. So, instead of referring to the company that is paying the farmer, the language below says [Buyer]. The same is true for the farmer, who is always called the [Farmer]. Anytime words are taken out in the quote there is an ellipsis.

A. Entire Agreement

One thing that is highly likely is that the contract will say, in one way or another, that the Agreement itself contains all of the terms of the contract. This means that promotional materials, handouts, verbal assurances, and any other explanation of the meaning of the contract are not relevant legally. One contract states:

[The Agreement] includes all of the annexes and terms and conditions . . . appended hereto which shall be deemed to form part of [the Agreement]. [The Agreement] constitutes the entire agreement between the [parties] and supersedes all prior agreements relating to the subject matter of [the Agreement]. [The Agreement] may be amended or modified only by a written instrument signed by both [parties].

A different contract says:

Except as expressly set forth herein, this [Agreement] and the document referenced herein sets forth the entire [agreement] and understanding of the [p]arties relating to the subject matter herein and supersedes all prior agreements between them. No modification of or amendment to this [Agreement], nor any waiver of any rights under this [A]greement shall be effective unless in writing signed by the [parties].

In other words, for example, if a party to a carbon contract speaks with a farmer and clarifies the meaning of the contract, or assures the farmer about certain aspects of the agreement, unless those clarifications or assurances are actually written into the contract itself, they will not be binding. This is true even if there is no ill-intent on the part of either party. Considering that carbon contracts can last for years and even decades, relying on the verbal assurances of another party can be a financially dangerous mistake for a farmer—after all, it is quite possible that in five or ten years a person with whom a farmer has a conversation about the contract may no longer be employed with the company. For this reason, it is essential that all terms of the agreement are written into the contract itself.

B. Double Dipping

Every contract likely has something similar to the following.

[The Farmer] confirms that the [f]arm is not subject to any agreement with another ecosystem service that generates credits, offsets, assets, or claims related to soil carbon sequestration, changes in greenhouse gas emissions, improvements in water quality, and/or water use efficiencies that could conflict with the creation of or result in double counting of the [carbon credits] that are subject to the [p]rogram (excluding easement or contract that restrict the [f]arm to agricultural uses).

Because there is no overall regulation—mandatory or voluntary—it is not clear how a buyer would know that a farmer was double dipping. Compare this, for example, to the UCC system where it is completely public knowledge when there is a lien on property. It appears no one is trying to create a public system for that in carbon contracts. That said, it is not beyond the realm of possibility that the buyers could begin to share information. Further, there could be instances where a buyer would be forced to make business information public. A lawsuit, for example, or a bankruptcy. Or, one buyer could purchase another buyer, and would then have two lists of farmer contracts.

This language raises the question of whether farmers could also participate in a USDA carbon capture program. This is not clear in a number of the contracts. They often say that the farmer may not sign up for another “program.” The language does not say that another “program” includes a government program. This is a very significant unknown. And, as pointed out above, a verbal promise from a representative is not part of the contract, so if the contract does not explain whether a government program counts as a carbon capture program, a verbal explanation does not clarify the contract.

One would guess that at least some farmers will try to game the system. It is not clear how buyers will attempt to stop it. That said, a farmer can always try and negotiate different language into their carbon contract. For example, a farmer could request that the agreement more narrowly state that the “Farm is not subject to any non-governmental program” rather than simply stating that the Farm cannot be part of another “program.”

C. Additionality

Contracts tend to require what is called “additionality.” This term refers to a requirement in some carbon contracts that farmers must use a new and different practice to reduce carbon. In other words, some contracts require that the farmer change their production practices in order to participate in the carbon market.

It is important to understand exactly what counts as additionality.

D. Length

Contracts vary in length. Some last up to ten years. It is important to know how long the farmer obligations last and if payment will continue for actions over the whole time.

E. Leased Land

Contracts tend to require that the farmer either own the land or get permission from the owner before signing a carbon credit contract. There tend not be requirements that the land not be rented. In one contract, the Farmer must represent and warrant that the farmer either:

- (i) owns the Lands on which the Offsets are generated and has legal ownership to the Offsets; or (ii) leases the Lands and has legal ownership to the Offsets pursuant to a lease of the Lands or an offset assignment agreement

In some of the contracts losing the lease, or control of the land, counts as a default. For example, under the terms of one contract, the Farmer

AGREES AND ACKNOWLEDGES THAT ANY FAILURE TO ABIDE BY THE TERMS HEREIN WILL RESULT IN [Farmer] LIABILITY FOR ANY REVERSAL OF CARBON OFFSETS PURSUANT TO THIS AGREEMENT.

Under the same contract, this includes the requirement that the “[Farmer] shall provide Providers prompt written notice of any loss or potential loss of control of the Property”

F. Practice Requirements

Practices can be called many things. One contract, for example, refers to them as “regenerative practices.”

Some descriptions of practices are general. Others are much more specific. If there are annexes or appendices that explain the practices more specifically these are extremely important to read and understand.

Examples of practices that are in contracts include the following.

(1) Zero Tillage (No-Till)

This is defined by one contract as “a shift from conventional or reduced tillage to zero tillage.” Or, as another contract states, low or no till practices mean “the reduction or elimination of soil tillage that results in the retention of [greenhouse gases] in the soil.”

(2) Improved Tillage

In one contract improved tillage is defined as a shift from “conventional tillage to reduced tillage.”

(3) Cover Cropping

In one agreement cover cropping is defined as a “shift from no cover cropping to cover cropping.”

(4) Nitrogen Management

Nitrogen management is defined in one contract as “optimization of nitrogen use.”

(5) Pasture Management

Pasture management is defined in one contract as a “shift in range and/or pastureland management practices.”

(6) Buyer Services

Some contracts require that the farmer use the Buyer’s sustainable products or advice regarding practices.

(7) Maintaining Practices or Capture

Agreements also sometimes specify the extent and how the capture carbon stays captured. Allowing the carbon to escape can create default.

G. Access to Farm

The buyer will likely want the right to inspect the farm. Not all farmers will be enthusiastic about this.

[Farmer] will permit [Buyer], its representatives and any third party service providers of [Buyer], verifiers, and/or auditors with full access to the Lands, books and records, data and information relating to the Lands, the [Farmer's] farming operations and offices at any time, for the purposes of performance of each party's obligation . . .

H. Measuring Sequestration of Carbon

As of now, in general, there is not a set of standardized and agreed upon metrics for measuring practices and carbon outcomes. Accurate measurement and verification of carbon credits from farming is generally thought to be difficult and costly. In general, collecting soil samples and measuring soil organic carbon is thought to be the most accurate way to measure, but it is often seen as too costly and time-consuming. Satellite images might be useful but apparently have their own limitations. A great deal of work is being done to improve testing and estimates of soil carbon on agricultural land. As a result, the main players in agricultural carbon sequestration rely on what are known as scientific models that estimate how much carbon is sequestered based on the agricultural practices adopted.

Some contracts pay based on a calculation of carbon sequestered. In one contract, for example, a carbon credit is considered to be equal to one metric ton of CO₂ "either sequestered in soil or not emitted to the atmosphere as a result of [Farmer's] implementation of the Regenerative Practices." For this contract there is a "carbon standard" used to measure the carbon.

One contract provides that a certain university-created model of carbon capture will be used. The contract, however, says that "other models selected by [the Buyer] at its sole discretion."

In one contract, payments are based on a "quantification" of carbon that comes from a scientific model. In the contract, the Farmer is required to accept that

changes in the carbon removal quantification might occur due to updates to the [models used] or other models that feed into the [quantification model]. In the event of a [model] update, [the Buyer] will communicate [updates] to the [Farmer] in writing, and the [Farmer] will accept and comply with the [updates] when, as, and if such [updates] are activated.

Each of the programs seems to have a different model that is named.

Some contracts say that the model can be changed at the discretion of the buyer. This could mean a radical change in the payment to the farmer.

I. Payment and Market Price

Payment methods vary. In some contracts, there is a payment by acre. In others there is payment based on the carbon that is estimated to be sequestered. At least one does a mixture of these two.

In several contracts payment is based on what the carbon credit sells for. For example:

[Farmer] will receive . . . a [share] of the net proceeds resulting from the sale and delivery of [carbon credits] as provided herein.

One contract says:

[The Buyer's] goal is to generate Credit and facilitate the sale of the Credits to third parties.

It is important to know what kind of market will be used. In some instances the Buyer also runs the market.

Buyers tend to retain sole control over how carbon credits are marketed. For example:

[Buyer] in its discretion, shall use commercially reasonable efforts to . . . manage the development, marketing and sale of [carbon credits] arising from the [agreement].

In one contract, payments are based on a "payment rate." The calculation of the payment rate, in this contract, starts with a full 100 percent of the payment rate. Twenty percent is not paid and becomes part of a "holdback." The Buyer must sell the carbon credit. In this contract, it appears that if the Buyer is not able to sell the carbon credit, the farmer would not be paid. In addition, the Buyer will subtract an additional percent of the payment in order to cover "fees" for the Buyer and the Registry.

One contract states that the first payments will be no less than \$10,00 per verified carbon credit. This [payment rate] only applies for what the contract calls the "First Sale." It does not apply to later sales. A contract for the same buyer says that payments after the first year "will be determined and established by the Buyer in its sole discretion."

The same contract continues in a way that suggests the buyer could later set the price at a much different rate:

While not guaranteed and subject to change, [the Buyer's] anticipated and target Payment Rate is at least 75% of the weighted average sale price per Carbon credit sold to a third party from the applicable credit cohort. . . . The [payment rate] for any verified [carbon credit] allocated to [the Farmer] during the [t]erm will be determined and established by [the Buyer] in its sole discretion.

J. Payments Not Guaranteed?

In one contract, the buyer is named as a corporation. The buyer required the farmer to implement certain practices. Based on adopting the practices an "third-party independent registry" issues carbon credits to the buyer. If, for some reason, these carbon credits are not issued by the third-party registry, the contract says that the "[Farmer] acknowledges that [Buyer] does not guarantee the issuance of Carbon Credits."³ This appears to mean that even if the farmer executes the contract, in this case, by changing practices, if for some reason the third party registry does not issue the carbon credits, the farmer has no legal remedy with the buyer.

K. Contract Cancellation: Market Conditions? Sole Discretion?

Most contracts will include a list of things that mean the farmer is in violation of the contract—or in legal terms has breached the contract.

One contract reads as follows:

Insufficient [Carbon Credits, Data or Market Conditions. If [carbon credits], Customer Data, or market conditions are deemed by [Buyer], in its sole discretion, to be insufficient for purposes of [the project], the [Buyer] may terminate this Agreement upon written notice to the [Parties].

Part of this provision makes sense. If the farmer does not provide adequate data, that could be a reason to terminate the contract. Of more concern is the idea that the contract can be cancelled due to “market conditions.”

“Sole discretion” means sole discretion. The buyer’s decision to cancel the contract probably does not need to be reasonable.

Here the farmer could be left having adopted expensive new practices and the contract could be cancelled for nothing the farmer has done, and the decision to cancel does not need to be based on anything excepts the buyer’s decision.

L. Default by Farmers

Contracts generally set out some part of the consequences for a farmer that defaults on a contract, and also explain a number of things that can count as a default. This can include, for example, allowing the captured carbon to escape, abandoning the farming practices before the agreement allows, and other things.

One contract says the Farmer will be in default if, among other things, the farmer “fails to use reasonable commercial efforts to perform any of the undertakings, covenants or obligations made by the Customer hereunder” or “fails to use reasonable commercial efforts to farm the Lands in a manner that will generate or create the required Offsets under the applicable Project”

Often the farmer forfeits future payments that may have already been earned but are not yet paid or vested. For example, one contract states:

In the event of material default by [Farmer], including unilateral termination of this Agreement by [Farmer] or other action taken by [Farmer] that results in the reversal of soil carbon sequestration or emission reductions, non-issuance, or cancellation of the {carbon credits}, [Farmer] shall be liable to [Buyer] for any and all, losses, costs, penalties, damages, or other liabilities or expenses (including reasonable legal fees) incurred by [Buyer] with respect to the reversal, cancellation, revocation, or retirement by the Registry of Carbon Credits issued with respect to the Covered Acres or with respect to the termination of this Agreement, subject to a maximum liability of an amount equivalent to the total value of this Agreement.

In some cases, especially if the buyer decides the farmer acted in bad faith, the buyer can seek to get payments returned.

M. May Provide Information – But Not Liable for It

The buyer may suggest or require that certain products or services be used.

The [Buyer] may makes resources or advice relating to [carbon farming practices] or agricultural practices in general, and/or carbon credit developments available to [the

farmer], either directly or through third parties . . . the [information] may include information from third party sources that may not have been independently verified [by the Buyer] . . . Resources are provide for educational purposes, and are subject to change. . . . Resources should not be solely relied upon by [the farmer] . . . and the Entity “explicitly disclaims any representations, warranties or guarantees with respect to any specific results or outcome with respect to the adoption of, or changes to, an agronomic practices on [the Farmer’s] land.

N. Who Owns Data

The measurements on a farm after certain practices are adopted, and a comparison of before and after, is valuable. An interesting question is who owns the data.

A contract that agrees that the data is owned by the buyer is probably enforceable. That means it is possible that the data could be sold to someone who could use it for various reasons. It also means that the farmer may not have the right to the data.

One contract has the following language:

[the entity] collect[s] personal information (ie. information that can identify specific individuals, including by name, identification number, mailing address, e-mail address, and other personal characteristics or attribute’s), and details about your farming practices, land details, land use, infrastructure, management plans, economic conditions, sustainability practice, operational details, customized services and results . . . [The Entity] will use your personal information . . . [to] provide maintain and improve services, research, and develop new services . . .

O. Acts of God

For many years, many types of contracts had what have been called “force majeure” clauses, or acts of God clauses, that basically allow an out for a party facing something that no one could have foreseen that makes executing the contract impossible. These days, such provisions seem more realistic.

In one contract, for example, an Act of God includes a fire or weather-related event.