GUIDANCE FOR LANDLORDS AND TENANTS ON ENTERING PUBLIC AND PRIVATELY FUNDED ENVIRONMENTAL AGREEMENTS IN THE CONTEXT OF AGRICULTURAL TENANCIES

Joint guidance from the Tenant Farmers Association (TFA) and Country Land and Business Association (CLA)

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This guidance is accurate at the time of writing but members of the TFA and CLA should always ensure they are using the latest version available.

Introduction

1. With the introduction of the new Environmental Land Management (ELM) schemes, and an increased focus on other sources of payment for environmental services, including carbon credits and biodiversity net gain, there is a need for clarity about how landlords and tenants can collaborate to take advantage of these opportunities.

Over-arching principles

2. The following principles have been agreed by the TFA and CLA to help initiate conversations between tenants and landlords about entering environmental agreements:
    a. The person delivering the environmental goods or services, whether paid for by the private or public sector, should be entitled to receive payment, unless they are acting as a contractor or employee.
    b. The transition from current to future environmental schemes should be managed so as to achieve the best outcomes for members and for the environment.
    c. There must be clarity over who is entering into agreements or contracts to deliver environmental outcomes, to avoid the risk of inadvertent double funding or incompatible contracts.
    d. Landlords and tenants can deliver more environmental outcomes and unlock additional marriage value from environmental investment by working together.

Eligibility and management control

3. *Principle: The person delivering the environmental goods or services, whether paid for by the private or public sector, should be entitled to receive payment, unless they are acting as a contractor or employee.*

4. Delivering the public goods involves:
    a. The person who has management control of the land for that purpose;
    b. The person who designs the scheme and agreement details;
    c. The person who implements the scheme and delivers the land management;

d. The person who is taking on the risk and liability for delivery of the public goods.

Each of these functions could be carried out by landlords, tenants, or a partnership between the two – as already happens under existing environmental management schemes. In many cases, collaboration between landlord and tenant will be the appropriate way forward.

5. "Management control" means that those entering an agreement must have control of all the land and all the activities needed to meet agreement requirements, including any capital obligations or management prescriptions, for the full duration of the agreement. It may be that the management control required to deliver environmental agreements is split between multiple individuals, whether landlord and tenant or multiple land managers.

6. Contracts for the delivery of public goods and ecosystem services do not over-ride existing tenancy agreements. Consent from the landlord may be needed to enter multi-year agreements, depending on the requirements of the scheme and the terms and nature of the tenancy. Whilst Agricultural Holdings Act 1986 (AHA) tenants will have security of tenure, tenants occupying under Farm Business Tenancies will need consent if they do not have sufficient headroom within the remaining terms of their agreements. In terms of both statutory regimes, there may be user clauses which restrict access to schemes and where tenants will need to seek consent from their landlords. AHA tenants have the ability under the changes introduced by the Agriculture Act 2020 to refer to arbitration situations where they are unable to obtain their landlord's consent or an agreed variation of terms.

7. Neither landlords nor tenants should enter into agreements that are incompatible with existing agreements on the land or result in double funding. In cases where incompatibility arises, discussions should be opened between the two parties before signing any new contract or agreement.

8. A landlord might refuse consent for a tenant to enter an environmental scheme for a number of justifiable reasons, for example if it prejudices the landlord's tax position; results in a devaluation of the freehold reversion; prejudices the position of a mortgagee.

9. Where different outcomes are being delivered under separate schemes and there is a clear delineation between those schemes, it should be possible for more than one scheme or agreement, whether funded publicly or privately, to be in place over the same land or holding.

Guidance for legacy schemes and transition

10. Principle: the transition from current to future environmental schemes should be managed so as to achieve the best outcomes for members and for the environment.

11. Increasingly, there will be situations where TFA and CLA members are in existing Countryside or Environmental Stewardship agreements ("legacy agreements") and wish to transition into new environmental schemes.

12. If either the landlord or tenant has a legacy agreement and the aim is to transition to a new scheme, CLA and TFA members should aim to establish the following points:
    a. The extent to which either landlord, tenant or both parties want to engage in future environmental delivery on the land;

b. Whether the aim is to continue delivering what is contained in the existing scheme or to change what is being delivered;
c. What the best choice of scheme(s) is to deliver the desired environmental outcomes;
d. Whether a combination of agreements will be most appropriate in the situation;
e. In all the circumstances, what is in the best interests of both the landlord and tenant of the holding.

13. Where there is a desire for both landlord and tenant to enter into separate environmental agreements - for example the tenant enters into the Sustainable Farming Incentive and the landlord enters into Local Nature or Landscape Recovery, or for combining public and private funding, the following points should be considered:
    a. Both parties should be aware of the commitments in the respective existing agreements to ensure there are not incompatible agreement options or the risk of double funding for the same action;
    b. Consider the timescales of the various agreements and the implications of combining agreements of different lengths on the same land or holding;
    c. Identify opportunities for mutually supporting environmental management across different agreements as these may lead to higher payments;
    d. Check that the actions required under the new environmental agreements are compatible with what landlord and tenant are permitted to do under existing tenancy agreements.

14. If either party wishes to end an existing agreement early, they should be satisfied that there is no detrimental effect on the other party. In cases where the new agreement differs significantly from the existing one, discussions should be opened up between the parties before a decision is made.

Guidance for new tenancies

15. Members need to be aware of and take advice on any commitments included in proposed and existing tenancy agreements relating to the delivery of public goods and entry into publicly or privately funded environmental schemes.

16. When a Farm Business Tenancy ends, there are opportunities for both the landlord and tenant to agree new terms. There may be an incentive for both parties to take part in different environmental schemes, whether funded publicly or privately, which complement each other. In these cases, it may be beneficial to look at granting a longer-term tenancy to achieve those joint goals.

17. Tenancy agreements should be future-proofed to take account of future Government schemes and emerging environmental markets.

Combining public and private funding on the same land or holding

18. Principle: there must be clarity over who is entering into agreements or contracts to deliver environmental outcomes, to avoid the risk of inadvertent double funding or incompatible contracts.

19. When considering combining multiple environmental agreements on a single piece of land, it is important to look at the details of any contract or agreement. An agreement may pay for specific management actions or for defined environmental outputs or

outcomes, or some combination. However, the actions paid for (e.g. planting or managing hedgerows) may deliver multiple environmental outcomes (e.g. carbon storage, biodiversity and water management). Therefore an agreement must be clear as to which of these outcomes is being paid for in order to combine multiple income streams funding different environmental outcomes.

20. From the point of view of carbon markets, the carbon already stored in soil, plants or trees has little or no value. Carbon markets rely on the concept of additionality, which means it is the potential of the land to sequester and store additional carbon which is the source of value. Payments within carbon markets will be made for adding carbon to those stocks that already exist. Landlords and tenants should ensure clarity within tenancy agreements over who has the right to that carbon sequestration potential.

21. Before considering monetising carbon, parties should undertake a carbon audit in a common format so that there is robust evidence of where carbon is stored, the nature of that carbon, and the potential for further carbon sequestration. This should also account for who manages the carbon/natural capital and storage potential. Robust scientific evidence is a prerequisite to tackling the legal and business issues outlined below.

22. The agri-food supply chain is aiming to reduce carbon emissions by supporting or requiring farmers to adopt low carbon or carbon positive practices. Where either party is looking either to reduce their carbon footprint or seek opportunities to sequester, then both parties will need to reach agreement so as to reduce the risk of double counting of the resources.

23. Environmental markets tend to encourage long term or permanent land management. Biodiversity net gain will last for a minimum of 30 years and carbon markets encourage permanent storage of carbon. This will require an examination of relative abilities of landlords or tenants to deliver on that commitment. Members should also consider the long-term, residual impacts of entering a scheme, for example the risk of statutory or non-statutory designation or the need to repay funds if agreements are terminated early. Any liability for removal of carbon or other environmental features during or after a contract term must be made clear to all parties from the outset.

24. For both AHA and Agricultural Tenancies Act tenancies, use clauses may restrict tenants' activities on the land. Depending on the nature of those use clauses, it could be that activities aimed at delivering carbon or other environmental benefits will need to fall within the definition of agricultural purposes and the Rules of Good Husbandry, require the consent of the landlord, or necessitate the negotiation of new tenancy terms or a new tenancy agreement.

25. Members should be aware of any restrictions, exceptions or reservations in their tenancy agreements, and the lengths of those agreements, when considering entering into private environmental agreements.

Collaboration to deliver environmental outcomes

26. Principle: landlords and tenants can deliver more environmental outcomes and unlock additional marriage value from environmental investment by working together.

27. Government policies will incentivise environmental delivery at the landscape scale, via the Local Nature Recovery and Landscape Recovery schemes, and through the

Nature Recovery Network. Collaboration will be required to achieve this, including between landlords and tenants.

28. There is a mutual benefit to groups of members (for example as part of farm clusters) willingly entering into joint agreements to deliver shared environmental outcomes, including land management, training and skills development. Due to the increased number of environmental objectives delivered, this type of collaboration could command higher levels of payment.

29. Collaborative working can result in efficiency gains and economies of scale, for example there may be scope to do one or more of the following:
    a. Joint ecological assessments to provide baseline environmental data across a landscape in a common format;
    b. Shared advice and facilitation, for example through Countryside Stewardship Facilitation Funding and its successor in ELM;
    c. Sharing of equipment, machinery or joint contracting to deliver environmental management;
    d. Group training to increase capacity to deliver environmental management;
    e. Joint land management planning or group applications to environmental schemes.

30. TFA and CLA members are advised to consider the best arrangements for collaborative working, with clear roles and responsibilities for those involved and clarity over who takes on what level of risk and liability for environmental delivery.

This guidance is based on the limited scheme information available at the time of publication. This is a developing topic and CLA and TFA members are encouraged to seek further advice from their membership organisations or other qualified advisers before entering ELM schemes or private sector environmental agreements.