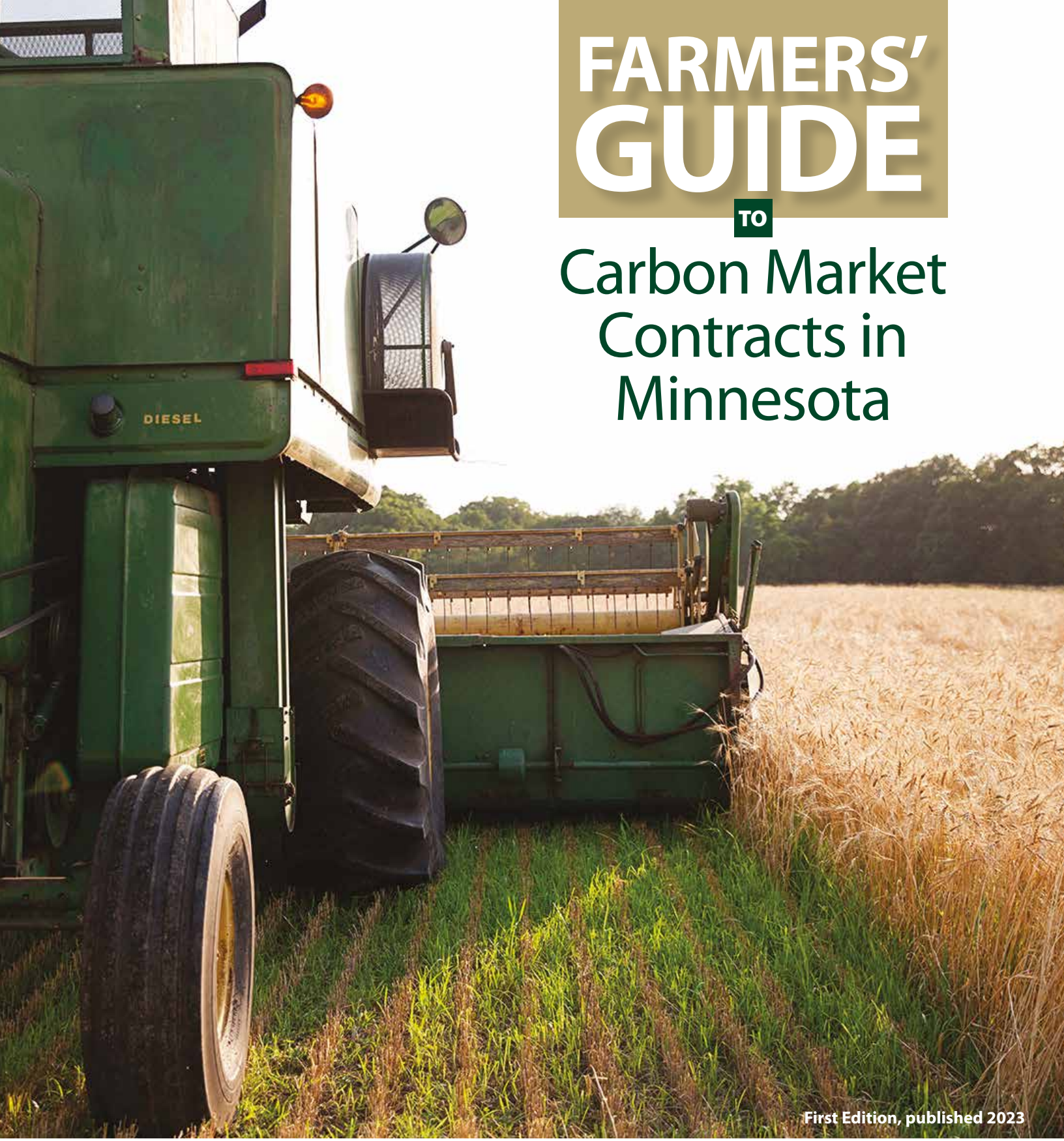
FARMERS' GUIDE TO Carbon Market Contracts in Minnesota



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DEPARTMENT OF AGRICULTURE

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LEGAL ACTION GROUP FARMERS'

About this Guide

The Farmers' Guide to Carbon Markets is a direct response to the questions and concerns raised by Minnesota Farmers Union (MFU) members. With one fifth of the world's largest companies setting net-zero emissions targets, farmers are being asked to make changes to their operations that sequester carbon and sell companies 'credit' for sequestered carbon. These relationships between farmers, large companies, and often third-party verifiers are defined by contracts.

Minnesota Farmers Union's family farmer members asked for help evaluating these contracts and deciding what's right for their farms. Are there risks involved? And what constitutes a fair deal?

To answer these questions, MFU partnered with experts at the Minnesota Department of Agriculture (MDA), Farmers' Legal Action Group (FLAG), and an advisory group of farmers from across the state to publish this Guide. Together, the group sought to create a practical, farmer-informed guide to help farmers evaluate carbon market contracts.

Through this work, we hope to respond directly to farmers' concerns, empower new leaders on climate, and to advance solutions on agricultural and working lands. This effort would not have been possible without the time and expertise of our advisory group made up of ten producers from around the state. Thank you to:

- Sarah Barrett – Brainerd
- Hannah Bernhardt – Medicine Creek Farm, Finlayson
- Eunie Biel – Biel Dairy, Harmony
- Tom Cotter – Cotter Farm, Austin
- Angela Dawson – 40 Acre Hemp Coop, Sandstone
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- Pat Lunemann – Twin Eagle Dairy, Clarissa
- Peter Schwagerl – Prairie Point Farm, Browns Valley
- Bruce Tiffany – Tiffany Farm, Redwood Falls

Thank you to the McKnight Foundation for funding this important project.

These materials are intended to provide general legal information. Farmers with specific questions should consult an attorney for advice regarding their particular situation.

Contents

I. Introduction

The Farmers' Guide to Carbon Market Contracts in Minnesota 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 Guide focuses on contract language and the meaning of that language. The Guide does not look at whether any particular contract is a good deal. Instead, the aim is for farmers to have the information needed to make that decision for themselves.

II. Contracts, Lawyers, Reading

If a farmer is considering signing any contract with significant stakes—including a carbon contract—it always makes sense to seek legal advice first. And it is always important to read and understand a contract.

III. The Approach of This Guide

This guide does three main things:

1st

Discusses the current market for carbon contracts and in particular some of the aspects of these markets that can become important for the contract terms.

2nd

Discusses a few points in Minnesota contract law that can be important for carbon contracts.

3rd

Looks at selected contract language and the meaning of that language.

The sources and format for the Farmers' Guide to Minnesota Carbon Market Contracts are discussed in the following sections.

A. Minnesota Law

Contract law varies somewhat from state to state. To the extent the Guide discusses contract law it mainly refers to Minnesota law. It is important to note, however, that a contract may require certain parts of the agreement to be governed by the law of another state. That type of language can be binding on the parties to the contract.[1]

B. Footnotes

This Guide uses footnotes to refer farmers to the sources we used in writing this Guide. That includes some Minnesota court cases, some Minnesota statutes, and some references to sources that discuss aspects of Minnesota law. The footnotes also include references to articles about carbon markets and how they work. Where possible an internet link to the articles is included.

C. Analyzing Carbon Contracts

The majority of the Guide focuses on the language of carbon contracts. There seem to be about a dozen or so basic contracts currently in use in the United States. The number of voluntary carbon programs for agriculture has grown in the last few years.[2] These contracts change from year to year, and the number of different contract models will certainly change over time. There are written efforts to compare these contracts.[3]

In this Guide there are quotes of contract language. The quotes all come from actual contracts, but the Guide does not say any quote is from a particular contract. The Guide does not include whole contracts. This is the approach for a couple of reasons.

First, the goal of this Guide is to help farmers understand contract terms that are common to these agreements. These terms will often be similar from one contract to another, but not always. Our aim is for farmers to understand what is meant by common terms.

Second, 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 Minnesota farmers. And if there was, the situation could change as the contracts are changed over time. Understanding the basic terms that appear in many contracts, however, can help farmers understand what they are

1 For example, see 10 Dunnell Minn. Digest, Courts § 4.04 (2022) ("Under Minnesota law, parties to a contract may control the choice of law by an express contractual provision."). See also *Softchoice, Inc. v. Schmidt*, 763 N.W.2d 660, 666 (Minn. Ct. App. 2009) ("citing *Medtronic, Inc. v. Advanced Bionics Corp.*, 630 N.W.2d 438, 449, 454 (Minn. App. 2001) for the proposition that "Minnesota courts give effect to the parties' choice of law in a contract.").

2 Oranuch Wongpiyabovorn et al., *Challenges to Voluntary Ag Carbon Markets*, Applied Economic Perspectives and Policy 1, 2 (2022), at https://doi.org/10.1002/aepp.13254.

3 See *Carbon Science for Carbon Markets: Merging Opportunities in Iowa*, CROP 3175, Iowa State University, 29-39 (2022), at https://store.extension.iastate.edu/product/Carbon-Science-for-Carbon-Markets-Emerging-Opportunities-in-Iowa; 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.

signing.[4] Each farmer needs to look at the contract in front of the farmer and decide if it makes sense for the farmer.[5] Reproducing entire contracts that can change after this Guide is published does not really help with that goal.

Third, there are often, though not always, confidentiality clauses in these contracts.[6] It is possible that the firms presenting these contracts to farmers do not care a great deal if the contracts are copied. Then again, if they do not care, why is the confidentiality clause included in the contract? A priority for FLAG when writing this Guide is that no one anywhere along the line be punished for sharing a contract that FLAG used to write the Guide. There is a history in agriculture—in particular in the contract poultry and hog production sectors—of integrators being fierce about these confidentiality clauses. Integrators, for example, have been known to insert an odd typographical error in some contracts so that if the contract is copied and circulated, the contract can be traced to a particular farmer. We have no reason to believe this is happening with carbon contracts. Still, our goal is to make sure shared contracts do not get any farmer in trouble with a firm.

4 For example, in terms of possible payouts for farmers, some sources attempt to calculate break even points for farmers as they compare the cost of changed practices to the possible payment in the contract. See, for example, Wongpiyabovorn, *Challenges to Voluntary Ag Carbon Markets*, at 4-8; 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.

5 Other efforts to assist farmers in making these decisions include Sarah Sellars et al., *Weekly Farm Economics: What Questions Should Farmers Ask About Selling Carbon Credits?*, farmdoc daily (April 13, 2021), at https://farmdocdaily.illinois.edu/2021/04/what-questions-should-farmers-ask-about-selling-carbon-credits.html; Anel Cruz et al., *Carbon Markets: Assessing Opportunities, Risks and Challenges for Minnesota Agriculture*, Swette Center for Sustainable Food Systems (2020), at https://keep.lib.asu.edu/items/143764; Carbon Markets 101, Minnesota Corn Growers Association (2021), at https://www.mncorn.org/publication/carbon-markets-101/.

6 In 1999 the Minnesota state legislature barred confidentiality clauses in agricultural production contracts. See Minn. Stat. § 17.710. This section probably does not affect carbon contracts because this statute only applies to processors of agricultural products.

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

There are many good sources that explain how carbon markets came to be, and quite a bit of writing discussing the entire industry. For those interested in the science behind carbon markets for agriculture, thoughtful discussions are available.[7]

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

A. The Logic of Carbon Insetting vs. Carbon Offsetting

Many very large corporations claim that their activities are "carbon neutral." Often, these firms increase the use of renewable energy or make other changes within their own value chain and corporate practices. This is called "insetting."[8] For example, Nespresso, a division of Nestle, has claimed to use insetting within its value chain by planting three million trees in coffee plantations that supply it with coffee in Colombia, Guatemala, Ethiopia, and Costa Rica between 2014 and 2019.[9]

Many other corporations, however, elect to purchase what are called "carbon credits" as a way to compensate for their carbon footprint without making changes to their own operations. A carbon credit certifies that someone—in our case a farmer—took certain actions that captured carbon or reduced greenhouse gas (GHG) emissions 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 sold. 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. The remainder of this Guide will focus primarily on contracts related to carbon credits and offsetting.

While some governments have required a form of offsets that drive carbon markets, a very substantial source of the markets is the willingness of businesses to buy carbon credits without a government requirement.[10] By all accounts, these efforts are increasing.

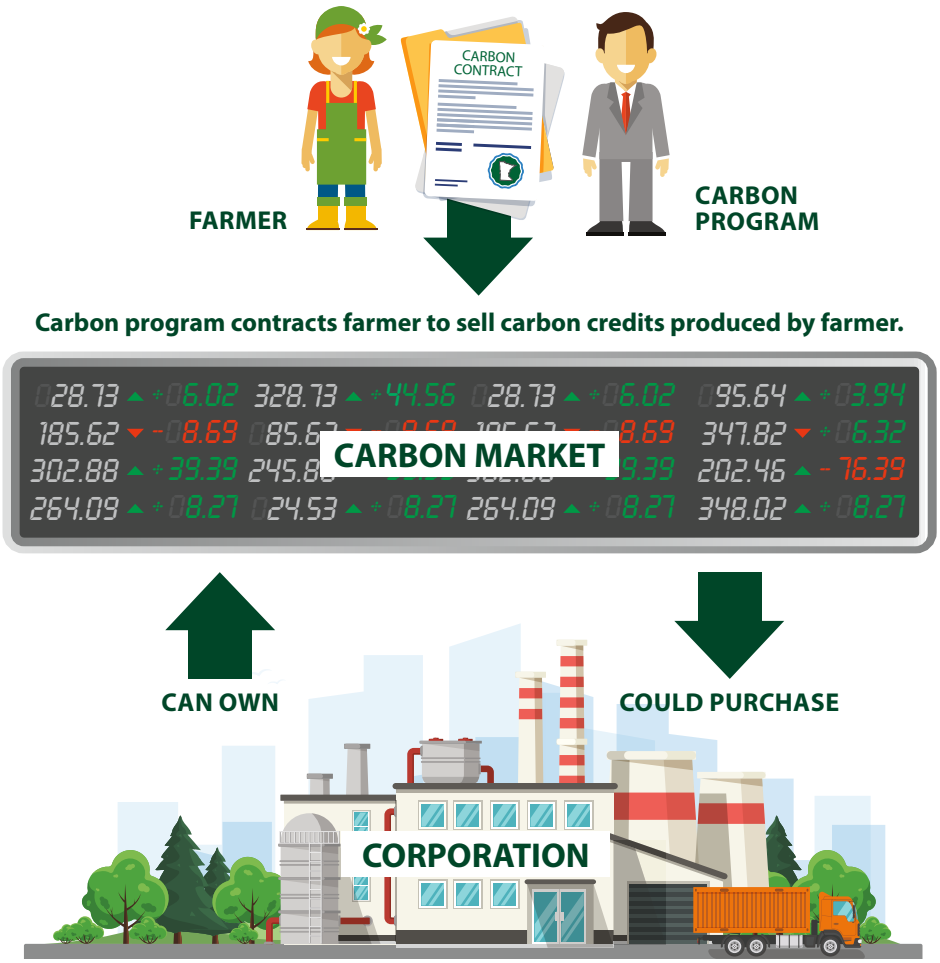
7 National Academies of Science, Engineering, and Medicine, *Negative Technologies and Reliable Sequestration: A Research Agenda*, 1-44, 247-318 (2019), at https://nap.nationalacademies.org/catalog/25259/negative-emissions-technologies-and-reliable-sequestration-a-research-agenda; Lisa Schulte Moore 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.

8 See R. Tipper et al., Is *"Insetting" the New "Offsetting"?*, Econometrica Press, Technical Paper TP-090413-A (April 2009), at https://ecometrica.com/assets/insetting_offsetting_technical.pdf; Iowa State University Extension and Outreach, *How To Grow and Sell Carbon Credits in US Agriculture* (November 2021), at https://www.extension.iastate.edu/agdm/crops/pdf/a1-76.pdf.

9 PUR Projects, Clients' Stories: Nespresso, at https://www.purprojet.com/insetting-programs/.

10 Wongpiyabovorn, *Challenges to Voluntary Ag Carbon Markets*, at 1.

B. 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. 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. Sometimes the buyer is also the entity that is setting up the carbon market where the credit will be sold. In addition, 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. There is also often a firm that makes calculations that estimate how much carbon is sequestered. 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, or go out of business, 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.

C. Carbon Markets are a Bit of a Free-for-All

At present carbon markets largely are not regulated. There are also 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. Bloomberg news has referred to carbon markets as an "opaque, unregulated industry," while one large European bank conducted a study of what it called a "wild west" industry.[11]

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. Weights, measures, and grading are very specific and essentially knowable and uniform.[12]

Measurement questions may not sound significant at first, but that may in part be due to the fact that farmers and the whole agricultural industry tend to take for granted the agreed upon methods for measurement of farm products. Basic measurements rules, summarized by USDA's Economic Research Service and others, 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.[13] For livestock, scales and weighing are regulated.[14] Further, grades and standards for many commodities are regulated at a very specific level.[15] Organic production, perhaps in some ways more similar to carbon capture farming than more conventional agriculture, has a firm and recognized set of rules that apply to anyone that wishes to claim production is organic.[16] These systems are far from perfect, but they tend to create an understood baseline for measuring what is produced by the farmer. 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 industry-wide voluntary standard for either certification or measurement.[17] 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 are emerging.[18] One is called Voluntary Carbon Markets Integrity (VCMI) Initiative. It is proposing a trial code

11 Natasha White and Akshat Rathi, *Offsets Watchdog Aiming for Clarity on Net Zero Risks Creating Confusion*, Bloomberg (June 14, 2022), at https://www.bloomberg.com/news/articles/2022-06-14/carbon-offset-claims-watchdog-vcmi-aims-for-net-zero-clarity-risks-confusion?leadSource=uverify%20wall (a paywall may exist if more than one article is viewed).

12 USDA, *Weights, Measures, and Conversion Factors for Agricultural Commodities and Their Products*, Agricultural Handbook no. 697 (1992), at https://www.ers.usda.gov/webdocs/publications/41880/33132_ah697_002.pdf.

13 USDA, Weights, Measures, and Conversion Factors.

14 For a quick summary, see USDA, *AMS Responsibility for Accurate Scales and Livestock Weights*, at https://www.ams.usda.gov/rules-regulations/packers-and-stockyards-act/regulated-entities/accurate-scales-and-livestock-weights; Ohio State University, *Bushels, Test Weights, and Calculations*, AGF-503 (2018).

15 For grain, see USDA, AMS, *Grain Grading Primer* (2016), at https://www.ams.usda.gov/sites/default/files/media/GrainGradingPrimer11272017.pdf; USDA, AMS, *Grades and Standards* (2022), at https://www.ams.usda.gov/grades-standards; Ohio State University, *Bushels, Test Weights, and Calculations*, AGF-503 (2018), at https://ohioline.osu.edu/factsheet/agf-503.

16 See, USDA, AMS, *About Organic Standards* (2022), at https://www.ams.usda.gov/grades-standards/organic-standards#.

17 Protocols for practices could well emerge. See, for example, Genevieve K. Croft, *Agriculture and Forestry Offsets in Carbon Markets; Background and Selected Issues*, Congressional Research Service, R46956 pages 44-45 (2021), at https://crsreports.congress.gov/product/pdf/R/R46956.

18 See Bloomberg Green, *Offset Watchdog Risk Creating Confusion* (June 14, 2022).

that is designed to test the credibility of corporate net-zero claims tied to the use of offsets. According to news reports, Google, Unilever Plc, and Hitachi Ltd. have agreed to try it. And Verra's Verified Credit Standard (VCS) Program has specific rules and requirements that participating projects must follow in order for VCS to issue what it calls "verified carbon units."[19] The idea being that carbon credits which are verified through such a system will represent credits of a higher quality that some buyers may prefer to purchase. For farmers, this means that it may be especially important to understand the system of measurement that a company will use to determine the quality of the carbon credits produced so that the farmer can avoid a situation in which their carbon credits are not worth as much when it comes time to sell them on the market.

There may be more regulation of carbon markets in the future.[20] International efforts have also resulted in a bit of a boost for voluntary carbon markets, and these could increase in importance over time.[21]

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.

D. 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. As will be noted below, 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 it is now. Or, Delta might be willing to pay more, or the same. No one knows.

Similarly, it is possible that the role of government in the market for carbon could change. The government role in agriculture markets can be significant. 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.[22] 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.

19 Verra, *Verified Carbon Standard*, at https://verra.org/programs/verified-carbon-standard/#how-it-works (December 7, 2022).

20 See Securities and Exchange Commission, Fact Sheet, *Enhancement and Standardization of Climate-Related Disclosure* (March 21, 2022); and 87 Fed. Reg. 69, 21334, Securities and Exchange Commission, The Enhancement and Standardization of Climate-Related disclosures for Investors (proposed rule) (April 11, 2022).

21 Wongpiyabovorn, *Challenges to Voluntary Ag Carbon Markets*, at 2.

22 See, for example, Genevieve K. Croft, *Agriculture and Forestry Offsets in Carbon Markets; Background and Selected Issues*, Congressional Research Service, R46956 (2021), at https://crsreports.congress.gov/product/pdf/R/R46956; John M. Crespi, *The First Legal Sep for an Agricultural Carbon Market is the Growing Climate Solutions Act of 2021*, CARD Policy Brief 21-PB 33 (2021), at https://www.card.iastate.edu/products/publications/pdf/21pb33.pdf.

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 various 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.[23] 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, the science that they use and rely on—is fluid and changing.[24]

> 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.

23 See, for example, Nathanial Gronewold, *Chicago Climate Exchange Closes Nation's First Cap-And-Trade System but Keeps Eye to the Future*, The New York Times (Jan. 3, 2011), at https://archive.nytimes.com/www.nytimes.com/cwire/2011/01/03/03climatewire-chicago-climate-exchange-closes-but-keeps-ey-78598.html; Tim Stumhofer, *The Chicago Climate Exchange Closure, a Vote for Robust GHG MRV?* GHG Management Institute (Nov. 10, 2010), at https://ghginstitute.org/2010/11/10/the-chicago-climate-exchange-closure-a-vote-for-robust-ghg-mrv/. The history of carbon markets is discussed in Lisa Schulte Moore and Jim Jordahl (eds.), *Carbon Science for Carbon Markets: Merging Opportunities in Iowa*, 24-28.

24 John M. Crespi and Stephen Marette, *How Carbon Credits are Certified Could Change the Market Structure*, CARD Policy Brief 22-B-37 (2022), at https://www.card.iastate.edu/products/publications/pdf/22pb37.pdf.

V. Contracts in General: The Writing in the Contract

Contracts of various forms have long been used in agriculture.[25] Carbon contracts resemble contracts used by farmers in some ways, and in other ways are different from normal farm contracts. It makes sense, therefore, to briefly review some of the important parts of Minnesota law that affect carbon contracts.

A contract is a promise that carries with it a legal obligation.[26] While many important rules govern contract law, for this discussion one point is central. That is, from a legal point of view, for these and other contracts, 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.[27] Further, if parties carry out an unwritten contract, courts can conclude that there was a real and enforceable contract. For the carbon contracts in our discussion, however, the writing in the contract is what counts.

This has important implications for carbon and other contracts.

First, 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 makes 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 change. This option for farmer negotiation sounds good, but in most carbon contract cases the other party is not likely to agree.

Farmers are always free to negotiate changes to the contracts that are offered to them. The carbon sequestration contracts, however, are often 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.[28] 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.

25 Christine Witt, *Farmers' Use of Contracts Has Declined Over Last 25 Years*, Amber Waves, June 23, 2022, at https://www.ers.usda.gov/amber-waves/2022/june/farmers-use-of-contracts-has-declined-over-last-25-years/; Various perspectives on how contracts in agriculture should be viewed include Christopher R. Kelley, *Agricultural Production Contracts: Drafting Considerations*, 18 Hamline L.R. 397 (1995); Neil Hamilton, *A Farmer's Legal Guide to Production Contracts* (1995); J.W. Looney and Anita K. Poole, *Adhesion Contracts, Bad Faith, and Economically Faulty Contracts*, 4 Drake J. Agric. L. 177 (1999); Randi Illyse Roth, *Redressing Unfairness in the New Agricultural Labor Agreement: An Overview of Litigation Seeking Redress for Contract Poultry Growers*, 25 U. Mem. L. Rev. 1207 (1995); Drake University, Farm Service Agency, national Sustainable Agriculture Coalition, *Contracting in Agriculture: Making the Right Decision* (2017), at https://sustainableagriculture.net/wp-content/uploads/2017/03/2016-Drake-FSA-NSAC-Production-Contracts-Guide.pdf. For Minnesota specifically, see Phillip L. Kunkel and Jeffrey A. Peterson, Agricultural Production Contracts (June 2015), at https://conservancy.umn.edu/bitstream/handle/11299/199823/agricultural-production-contracts.pdf?sequence=1&isAllowed=y.

26 Or, to put it a bit differently, a contract is a promise to which the law attaches a legal obligation. 8 Dunnell Minn. Digest Contracts § 1.00(a) (2022). Or, somewhat differently, again, an agreement between two or more parties for doing or not doing some particular thing.

27 See, generally, 8 Dunnell Minn. Digest, Contracts §§ 3.03, 3.20 (2022).

28 8 Dunnell Minn. Digest, Contracts § 3.14 (2022).

Second, from the legal perspective, a key point is that 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. It really 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, and other written or spoken promises do not count.

VI. Basics of Minnesota Contract Law

Given that most carbon contracts in Minnesota will be governed by Minnesota law, it is worth spending some time outlining the basic requirements for contracts in Minnesota.

A. Definition of a Contract

In its most basic sense, a contract is a promise, or a set of promises, that creates a legal obligation.[29] Stated otherwise, a contract is an agreement to either do something or not do something.

B. Oral Contracts Can be Valid

Generally, contracts can be legally valid whether they are made in writing or orally.[30] However, if an oral agreement is later written down into a written contract, the written agreement will be binding even if it differs from the oral agreement.[31] The law calls this rule the "parol evidence rule." In other words, if aspects of negotiations are not put into the final written contract, those parts of the negotiated issues do not become binding on the parties, and instead the law deems them waived or abandoned.[32]

This is an important rule to understand because it means that if a farmer negotiates with a company for a carbon contract, the only terms that are legally binding are those which end up in the written agreement itself.

C. When a Contract Must be in Writing

Although many contracts can be valid whether they are oral or written, some types of contracts must be made in writing in order to be enforceable in Minnesota. While there are a number of rules along these lines, some are especially important for this Guide. For example, a contract must be in writing if it cannot be performed within one year from its making.[33]

D. When a Signature is Required

When a party signs an agreement, the party is generally bound by that agreement.[34] That said, even if a signature is not required to make the contract valid, if a party acquiesces in, accepts, and acts on the terms of the agreement, then it is not necessary that the party sign the contract.[35]

29 Dunnell Minn. Digest, Contracts § 1.00 (2022).

30 Dunnell Minn. Digest, Contracts § 1.00 (2022).

31 Dunnell Minn. Digest, Contracts § 5.05(d) (2022); see also *Lehman v. Stout*, 261 Minn. 384, 389, 112 N.W.2d 640, 644 (1961); Restatement 2d of Contracts § 213.

32 Dunnell Minn. Digest, Contracts § 4.02 (2022) (citing *Karger v. Wangerin*, 230 Minn. 110, 114, 40 N.W.2d 846, 849 (1950)). Minn. Stat. § 513.01(1); Dunnell Minn. Digest, Contracts § 4.00(b) (2022).

33 Dunnell Minn. Digest, Contracts § 4.04 (2022) (citing *Winter v. Skoglund*, 404 N.W.2d 786, 791 (Minn. 1987)).

34 Dunnell Minn. Digest, Contracts § 4.04 (2022).

35 Dunnell Minn. Digest, Contracts § 1.02(a) (2022).

E. Terms Must be Definite and Certain

The terms of a contract must be definite and certain.[36] Nonetheless, Minnesota courts are reluctant to invalidate contracts merely because they are indefinite if a just result can be reached by upholding the agreement.[37] In general, this means that if a carbon agreement is specific enough that the parties understand what is required of them, understand the terms of payment, and have a clear understanding of the duration of the agreement, courts will enforce the contract.

F. Termination of Contracts

Many contracts include a provision that says the contract can be terminated by one party or both parties. Typically, there are specific circumstances that are described to inform the parties when and how a contract can be terminated. For example, while there is no legal definition of a "default" most contracts will describe those situations that will count as a default for purposes of that agreement. When a default is defined in a contract, or when a contract defines when and how the contract may be terminated, courts will strictly adhere to those conditions when determining whether the agreement has, in fact, been lawfully terminated.[38]

G. When are Contracts Not Enforceable

A contract will be considered illegal, and thus not enforceable, if it is contrary to statute or common law.[39] This includes agreements that are fraudulent.[40] In general, courts are very hesitant to interfere with the freedom of parties to contract, and thus hesitant to find a contract unenforceable unless the grounds for doing so are very clear.[41] Contracts are presumed to be lawful.[42]

H. Choice of Law—Which State's Law Applies

Parties to an agreement can choose which state's law will be used to govern the agreement.[43] This means, for example, that two Minnesota parties to a contract could agree that the law of Delaware will govern the contract.

36 Dunnell Minn. Digest, Contracts § 1.02(a) (2022).

37 Dunnell Minn. Digest, Contracts § 1.02(a) (2022) (citing *Hartung v. Billmeier*, 243 Minn. 148, 150-51, 66 N.W.2d 784, 787-88 (1954)); see also *Martens v. Minn. Mining & Mfg. Co.*, 616 N.W.2d 732, 753 (Minn. 2000).

38 Dunnell Minn. Digest, Contracts § 1.03l (2022) (citing *Indianhead Truck Line, Inc. v. Hvidsten Transp.*, Inc., 268 Minn. 176, 187, 128 N.W.2d 334, 343 (1964)).

39 Dunnell Minn. Digest, Contracts § 3.00 (2022).

40 Dunnell Minn. Digest, Contracts § 3.00 (2022).

41 Dunnell Minn. Digest, Contracts § 3.10 (2022) (citing *Twin City Pipe Line Co. v. Harding Glass Co.*, 283 U.S. 353, 356, 51 S. Ct. 476, 477 (1931)).

42 Dunnell Minn. Digest, Contracts § 3.31 (2022).

43 Dunnell Minn. Digest, Contracts § 3.18 (2022).

In general, if a carbon contract is signed in Minnesota, and also performed in Minnesota, Minnesota law would most likely govern.[44] If an agreement is silent as to which state's law governs the contract, courts might look at other factors to decide.[45]

I. 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.[46] This applies so long as the party had the ability and opportunity to read the contract.[47]

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.

J. Default

Minnesota 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 Guide.

K. The Ability of Future Legislation to Alter the Terms of a Carbon Contract

Given that the market for carbon contracts is fairly new, and the possibility for future legislation to regulate carbon markets, the question arises as to whether any such future legislation could retroactively alter the terms of a carbon contract.

In general, the legality of any contract is determined by the law that is in force at the time the contract is made.[48] However, if the law changes—and something to be done under an agreement later becomes unlawful—that portion of the contract could become unenforceable.[49]

The United States Constitution prevents states from passing laws that impair the obligations of parties to a contract.[50] The Minnesota Constitution similarly states that "[n]o . . . law impairing the obligation of contracts shall be passed."[51] However, while the general rule is that future legislation may not impair the obligations of parties to a contract, if a state has a "significant and legitimate public purpose" for legislation that substantially impairs the obligations of a contract, it is possible that the obligations under the contract could be altered by that later legislation.[52] It is far more likely that if the government seeks to regulate carbon contracts, the regulation will only effect contracts signed after the legislation goes into effect.

44 1 Minnesota Civil Practice § 6.46 (2022).

45 Courts might look to see if more than one state has sufficient contacts with respect to the agreement (for example, was the agreement signed in one state, but performance occurs in another state?). If so, there is a balancing test that courts conduct to weigh which state's law should apply. See 7 Dunnell Minn. Digest, Conflict of Laws § 3.00 (2022); see also *Nodak Mut. Ins. Co. v. Am. Family Mut. Ins. Co.*, 604 N.W.2d 91, 94 (Minn. 2000). For a more detailed description of what it means for a state to have "sufficient contacts" with an agreement, see *Jepson v. Gen. Cas. Co.*, 513 N.W.2d 467, 469-70 (Minn. 1994).

46 Dunnell Minn. Digest, Contracts § 4.03 (2022) (citing *Greer v. Kooiker*, 312 Minn. 499, 508, 253 N.W.2d 133, 140 (1977)).

47 See *Currie State Bank v. Schmitz*, 628 N.W.2d 205, 210 (Minn. Ct. App. 2001).

48 Dunnell Minn. Digest, Contracts § 3.09 (2022).

49 Dunnell Minn. Digest, Contracts § 3.09 (2022) (citing *Seaman v. Minneapolis & R. R. R. Co.*, 127 Minn. 180, 185, 149 N.W. 134, 136 (1914)).

50 U.S. Const. art. I, § 10, cl. 1.

51 Minn. Const., art. 1, § 11.

52 7 Dunnell Minn. Digest, Constitutional Law § 9.00 (2022); see also *Jennissen v. City of Bloomington*, 938 N.W.2d 808, 816 (Minn. 2020) and *Laue v. Prod. Credit Asso.*, 390 N.W.2d 823, 829 (Minn. Ct. App. 1986).

VII. 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, and the contracts use various names for these buyers. In the quoted parts of the contracts below, such businesses are called a Buyer.

The contracts also use various language to describe the farmers that are selling the carbon contract service. Sometimes, for example, the farmer is referred to as the "Supplier." In the sections quoted below the farmer is referred to as simply the Farmer.

In addition, in the contracts the farmer does not usually receive a direct payment for adopting a new practice. Instead, the farmer receives what is often called a "carbon credit." The carbon credits are then sold on a market. Some contracts refer to the credits as something else. In this Guide, they are all referred to as Carbon Credits.

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 specific company that is paying the farmer, the language below says [Buyer]. The same is true for the farmer, who is always called the [Farmer], and carbon credits, which are called [Carbon Credits]. Any time 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] incudes 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 thins [agreement], nor any waiver of any rights under this [a]agreement shall be effective unless in writing signed by the [parties].*

In other words, 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 very 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 of carbon contracts—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 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, might do this, or a bankruptcy. Or, one buyer could purchase another, and would then have two lists of farmer contracts. And, it is possible an effective voluntary registry of carbon contracts could be created.[53]

> Such language also raises the question of whether farmers could sign a carbon contract and also participate in a USDA carbon capture program or another governmental carbon capture program. This is definitely 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 will not be binding on the parties.

One would guess that at least some people will try to game the system by signing up for more than one carbon credit contract. It is not clear how buyers will attempt to stop it.

As noted above, 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."

53 See, for example, Genevieve K. Croft, *Agriculture and Forestry Offsets in Carbon Markets; Background and Selected Issues*, Congressional Research Service, R46956 pages 8-9 (2021), at https://crsreports.congress.gov/product/pdf/R/R46956.

C. Additionality

> Contracts tend to require what is called "additionality."[54] This term refers to a requirement in some carbon contracts that farmers must use a new and different practice to reduce carbon.[55] 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.[56]

D. Length

Contracts vary in length. Some last up to ten years. It is important to know how long the farmer's obligations last and if payment will continue for actions taken 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 [Farm] on which the [carbon credits] are generated and has legal ownership to the [carbon credits]; or (ii) leases the [Farm] and has legal ownership to the [carbon credits] pursuant to a lease of the [Farm] or [a carbon credit] 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 CREDITS] PURSUANT TO THIS AGREEMENT.* [57]

Under the same contract, this includes the requirement that the "[Farmer] shall provide [Buyers] prompt written notice of any loss or potential loss of control of the [farm] . . . ."

54 Wongpiyabovorn, *Challenges to Voluntary Ag Carbon Markets*, at 5.

55 See, for example, Iowa State University Extension and Outreach, *How to Grow and Sell Carbon Credits in US Agriculture*, p. 2 (Nov. 2021).

56 See Iowa State University Extension and Outreach, How To Grow and Sell Carbon Credits in US Agriculture (November 2021), at https://www.extension.iastate.edu/agdm/crops/pdf/a1-76.pdf.

57 Capital letters appear in the original contract.

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.

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 [farm], books and records, data and information relating to the [farm], 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 and Reduction in Greenhouse Gas Emissions

As of now, in general, there is not a set of standardized and agreed upon metrics for measuring practices and carbon outcomes.[58] Accurate measurement and verification of carbon credits from farming is generally thought to be difficult and costly.[59] 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.[60] 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.[61] 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.[62]

Some contracts pay based on a calculation of carbon sequestered or the reduction in greenhouse gas emissions. In one contract, for example, a carbon credit is considered to be equal to one metric ton of carbon:

58 Wongpiyabovorn, *Challenges to Voluntary Ag Carbon Markets*, at 2.

59 Wongpiyabovorn, *Challenges to Voluntary Ag Carbon Markets*, at 4; Hoyoung Kwon et al., *Greenhouse Gas Mitigation Strategies and Opportunities for Agriculture*, 113 Agronomy Journal 4639, 4643-4644 (2021), at https://acsess.onlinelibrary.wiley.com/doi/full/10.1002/agj2.20844.

60 Wongpiyabovorn, *Challenges to Voluntary Ag Carbon Markets*, at 4.

61 See, for example, Eric Potash et al., *How to Estimate Soil Organic Carbon Stocks of Agricultural Fields? Perspectives Using Ex-Ante Evaluations*, 411 Geoderma 1 (April 2022), at http://k2co3.net/assets/pdf/bondville.pdf (the official published version of this article should become publicly-available on January 13, 2023. See https://www.osti.gov/pages/biblio/1842344-how-estimate-soil-organic-carbon-stocks-agricultural-fields-perspectives-using-ex-ante-evaluation.); Lisa Schulte Moore and Jim Jordahl (eds.), *Carbon Science for Carbon Markets: Merging Opportunities in Iowa*, at 55-75.

62 Wongpiyabovorn, *Challenges to Voluntary Ag Carbon Markets*, at 2.

> *either sequestered in soil or not emitted to the atmosphere as a result of [Farmer's] implementation of the [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, also allows "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 [carbon 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 entity that sells the credits.

This 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 requires the Farmer to implement certain practices. Based on adopting the practices a "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]." 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], [Farmer] 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 a 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 a 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 except the Buyer's decision.

However, other contracts allow either party to cancel the agreement. For example, one contract states that "[either] [party] may terminate this Agreement, for any reason and in its sole discretion, upon sixty (60) days' written notice to the other [party]."

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 [Farmer] hereunder" . . . [or] . . . "fails to use reasonable commercial efforts to farm the [land] in a manner that will generate or create the required [credits] under the [agreement] . . . .*

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 [the Buyer or Buyer's agent] of [carbon credits} issued with respect to the [covered land] 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 and Advice—But Not Liable for It

The Buyer may provide resources to the farmer or give the farmer advice relating to carbon markets or carbon farming practices. Some agreements expressly state that the Buyer is not legally liable for the outcome if the farmer relies on the resources or advice provided. For example, one contract states:

The [Buyer] may make 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 provided 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 if for various reasons. It also means that the farmer may not have the right to the data.

One contract has the following language:

[the Buyer] collect[s] personal information (i.e. 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 serviced and results . . . . [The Buyer] 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.

Frequently Asked Questions

What is a 'carbon credit' and how do they work?

A carbon credit certifies that someone—in our case a farmer—took an action to sequester carbon or reduce greenhouse gas (GHG) emissions under the contract. That carbon credit is then sold on a market and purchased by large businesses looking to offset their emissions by paying, indirectly, for the farmers' practice.

Who is driving carbon markets?

The large companies who are looking to offset their carbon emissions by purchasing credits from people who are implementing climate smart practices.

Are carbon markets regulated?

No. There is currently no USDA certification for carbon capture practices, no regulatory system for measuring carbon capture standards, and no industry-wide voluntary standard for either certification or measurement. It is possible, however, that in the future carbon markets could become more widely regulated.

Can the price for carbon credits change?

Yes. The structure of carbon markets—who is involved, the techniques they use, the various roles they play, the science that they use and rely on—is fluid and changing. It is perfectly legal to create a contract for which the payment price of the contract can change as conditions change.

Can Carbon Contracts be negotiated?

Yes. Farmers are always free to negotiate and try to make changes to the contracts that are offered to them. Both parties will have to agree for any changes to be made.

Are promotional materials, handouts, or verbal assurances legally-binding?

No. Only what is written in the contract is the whole agreement. Anything communicated verbally by a representative of the other party is overwhelmingly likely not to be enforceable.

Will all contracts for Minnesota farmers be under Minnesota Law?

No. The parties involved can choose which state's law to use. If an agreement is silent as to which state's law governs the contract, and a dispute arises under the contract, the courts will decide.

Can future legislation alter the terms of a carbon contract?

Unlikely. If the government seeks to regulate carbon contracts, the regulation will only affect contracts signed after the legislation goes into effect. The legality of any contract is determined by the law that is in force at the time the contract is made. However, if a state has a significant and legitimate public purpose for legislation that substantially impairs the obligations of a contract, it is possible that the obligations under the contract could be altered by that later legislation.

Can farmers participate in other carbon capture programs?

Most contracts prohibit enrolling for credit payments on the same acre or practice with multiple buyers. It is unclear how a buyer would know if a farmer was 'double-dipping' because there is no regulation. If the contract does not explain whether a government program counts as a carbon program, a verbal explanation will not be binding on the parties.

Can carbon contracts be used on leased land?

Yes. Contracts tend to require that the farmer either owns the land or has permission from the owner before signing a carbon credit contract. In some of the contracts, losing the lease or control of the land counts as a default.

What are examples of practice requirements listed in carbon contracts?

Zero tillage, improved tillage, cover cropping, nitrogen management, pasture management, and buyer services. Descriptions of practices vary in specificity per contract.

Do buyers have the right to access the farm?

Yes. The terms of this access are often written in the contract.

How are the sequestration of carbon and greenhouse gas emission reductions measured for carbon markets?

There is not a set of standardized and agreed upon metrics for measuring practices and carbon outcomes. Scientific models are often used to estimate the sequestered carbon based on the adopted agricultural practices.

How do payments work?

Some are based on a calculation of carbon sequestered from a scientific model, and others are what carbon credits sell for. Some contracts state that the model can be changed at the discretion of the Buyer.

Who can cancel the contract?

If the term "sole discretion" is used, this means that the Buyer's decision to cancel a contract probably does not need to be reasonable. If a farmer would like to exit the contract, It is unlikely the Courts will find a contract unenforceable unless the grounds for doing so are very clear. Typically, there are specific circumstances described to inform the parties when and how a contract can be terminated.

What happens if a farmer defaults on their contract?

Often the farmer forfeits future payments that may have already been earned but are not yet paid or vested. Two examples of default are: allowing the captured carbon to escape and abandoning the farming practices before the agreement allows.

Who owns the data?

A contract that agrees that the data is owned by the Buyer is probably enforceable. It is possible that the data could be sold to be used for various reasons. The farmer may not have the right to the data.

Thank You to Our Partners in this Guide:

Farmers' Legal Action Group, Inc. (FLAG)

Farmers' Legal Action Group (FLAG) is a nonprofit law center dedicated to providing legal services and support to family farmers and their communities in order to help keep family farmers on the land. Authors for the guide can be reached at Stephen Carpenter: **scarpenter@flaginc.org** and Lindsay Kuehn: **lkuehn@flaginc.org**

Minnesota Farmers Union Foundation (MFU)

Minnesota Farmers Union (MFU) exists to advance the interests of its family farmer members through the principles of legislation, education and cooperation. The Farmers Union Foundation, a non-profit 501(c)3 organization, was established in 1958 to advance the educational mission of Minnesota Farmers Union. Since then, the Foundation has helped members and the general public learn about farming and farm cooperatives, their history and present challenges and opportunities.

Minnesota Department of Agriculture (MDA)

Based in St. Paul, our mission is to enhance Minnesotans' quality of life by ensuring the integrity of our food supply, the health of our environment and the strength of our agricultural economy. The Minnesota Department of Agriculture (MDA) has existed in one form or another for more than 100 years

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Stephen is a graduate of Drury College in Springfield, Missouri, and of Stanford Law School. At Stanford Law School, Stephen was active in the East Palo Alto Community Law Project, was a Stanford Law Review executive editor, and received a Skadden Foundation Fellowship that brought him to FLAG in 1993. At FLAG, Stephen's work has centered on discrimination in agricultural lending, debtor-creditor issues, disaster assistance, federal farm programs, sustainable agriculture and direct marketing, and the problems of farmers contracting for livestock production. He served as Senior Counsel in the Office of the Monitor in the Pigford case and is at present the court-appointed Ombudsman for the In re Black Farmers Discrimination case.

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As a former pig farmer turned lawyer, Lindsay joined FLAG in the summer of 2017. Though a native of Minneapolis, Lindsay received her B.A. from Northwestern University, in Evanston, IL, and then moved to Arkansas where she temporarily set aside her city roots for rural soil. During her time in Arkansas, Lindsay worked for Heifer International, a development organization striving to end hunger through providing livestock and agricultural training, while also helping to manage a small livestock farm dedicated to raising animals in a sustainable, healthy environment. Lindsay then attended the University of Arkansas, where she obtained her law degree as well as a Master's in Public Service from the Clinton School of Public Service. Lindsay clerked for a Hennepin County District Court Judge before joining FLAG.

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