



Ancillary rules: Reasonable steps to seek like-for-like biodiversity credits for the purpose of applying the variation rules

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1. Introduction

The Biodiversity Conservation Regulation 2017 (the Regulation) allows the Chief Executive of the Office of Environment and Heritage to publish ancillary rules for the interpretation and application of the offset rules and variation rules made under the Regulation. Clause 6.5 allows for the ancillary rules to set out reasonable steps that an applicant is required to take to obtain requisite like-for-like biodiversity credits before the variation rules can be applied.

These ancillary rules provide more detail on the minimum requirements for applicants to show they have taken reasonable steps to obtain like-for-like credits before the variation rules can be applied. If an applicant can show that they have taken all reasonable steps to obtain like-for-like credits, the consent authority or Native Vegetation Panel may approve the use of the variation rules.

2. Definitions

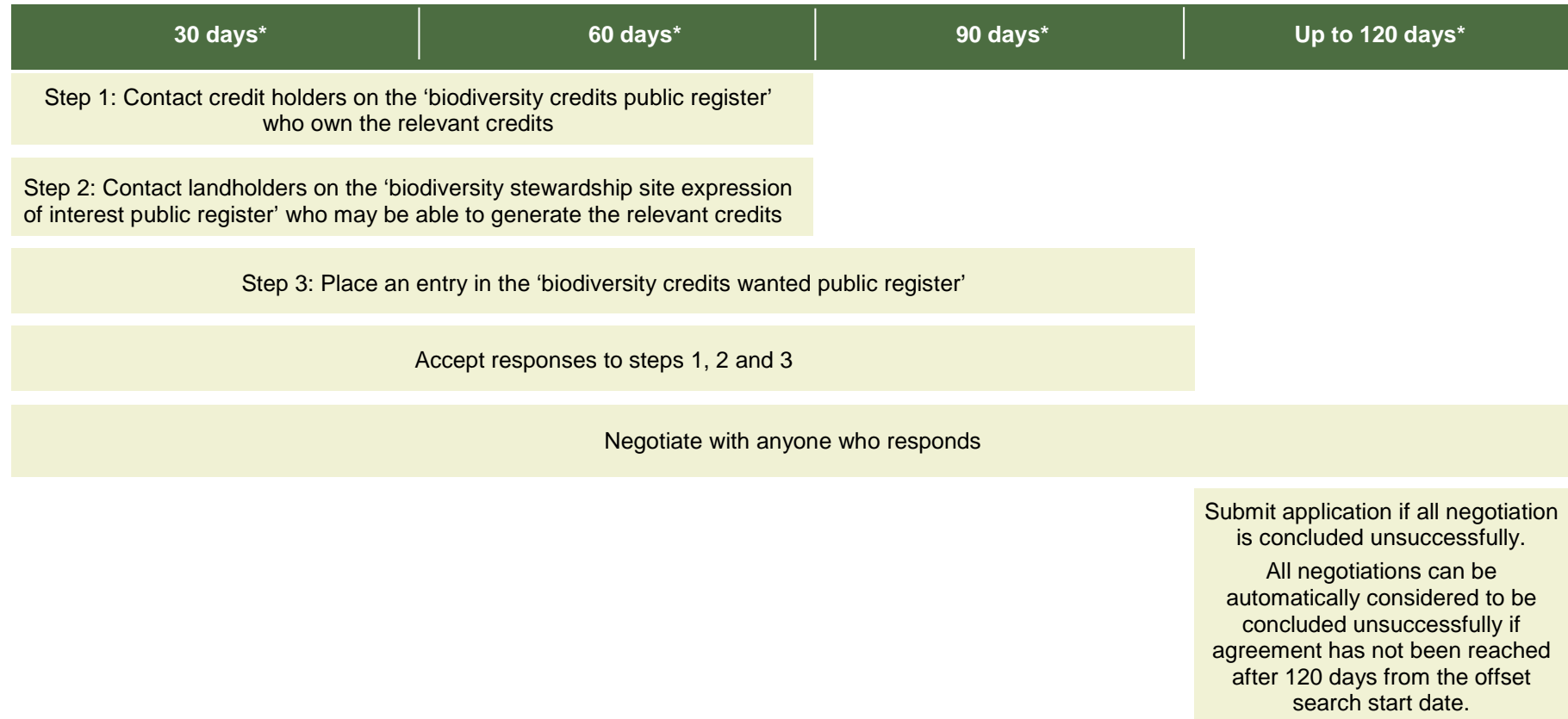
1. **Relevant application**, means any of the following where the applicant is seeking approval to use the variation rules:
 - a. An application for development consent or application for modification of a development consent made under Part 4 of the Environmental Planning and Assessment Act 1979 (excluding any application for a complying development certificate)
 - b. An application for an approval or modification of an approval under Part 5 of the Environmental Planning and Assessment Act 1979
 - c. An application for an approval or modification of an approval under Part 5.1 of the Environmental Planning and Assessment Act 1979
 - d. An application for an approval or modification of an approval to clear native vegetation under Part 5A of the Local Land Services Act 2013
 - e. An application for an approval or modification of an approval to clear native vegetation under the State Environmental Planning Policy (Vegetation in Non-Rural Areas) 2017
2. **Relevant credits**, means biodiversity credits for which the applicant is seeking to use the variation rules.
3. **Offset search start date**, means a date nominated by the applicant to start the period within which like-for-like biodiversity credits must be sought.

3. Reasonable steps to seek like-for-like biodiversity credits

An applicant must complete all of the reasonable steps set out in this section before a consent authority or the Native Vegetation Panel can approve use of the variation rules. The timeframes for completing these reasonable steps are also shown in Figure 1.

Figure 1 Minimum timeframes to complete reasonable steps to seek like-for-like biodiversity credits

* Days from offset search start date



3.1 Contact credit holders on the biodiversity credits public register who own the relevant credits

An applicant must contact, in writing, any credit holders with relevant credits available on the 'public register of biodiversity credits' (established through clause 9.4 of the Regulation) during the 60 days after the offset search start date, unless there are more than four credit holders for a particular relevant credit type on the register, in which case the applicant is only required to contact four landholders for each relevant credit type.

Written contact must be made no more than 14 days after the offset search start date or the date the entry was included on the register, whichever is later.

The applicant must negotiate in good faith with any relevant credit holder who responds to the proponent's initial contact up to 90 days after the offset search start date.

The applicant must continue negotiations until 120 days from the offset search start date is reached, unless it can be demonstrated earlier that it was not feasible to purchase relevant credits.

The applicant must provide evidence that it was not feasible to purchase credits from any of the relevant credits owners who were contacted by the applicant and responded within the timeframe.

3.2 Contact landholders on the biodiversity stewardship site expressions of interest public register who may be able to generate the relevant credits

The applicant must contact any landholders with the potential to create relevant credits on their property who have an entry on the 'public register of biodiversity stewardship site expressions of interest' (established through clause 9.8 of the Regulation) during the 60 days after the offset search start date. If there are more than four landholders with the potential to create relevant credits for a particular credit type, only four must be contacted in respect of that credit type.

Contact must be in the form of written contact and made within 14 days from the offset search start date or the date the entry was included on the register, whichever is later.

The applicant must negotiate in good faith with any landholder who responds to the applicant's initial contact within 90 days from the offset search start date.

The applicant must continue negotiations until 120 days from the offset search start date is reached, unless it can be demonstrated earlier that it was not feasible to purchase relevant credits from the landholder.

The applicant must provide evidence that, for the landholders who were contacted and responded within the required timeframe, it was not feasible for the applicant to purchase relevant credits from the landholder (including because the landholder was not willing to establish a stewardship site), or the applicant must provide evidence that agreement could not be reached within the 120-day period from the offset search start date.

3.3 Place an entry in the biodiversity credits wanted public register

An expression of interest for the relevant credits must be published on the 'public register of biodiversity credits wanted' (established under clause 9.7 of the Regulation) for a period of 90 days from the offset search start date.

The applicant must negotiate in good faith with anyone who responds to the applicant's entry on the public register up to 90 days after the offset search start date.

The applicant must continue negotiations until 120 days from the offset search start date is reached, unless it can be demonstrated earlier that it was not feasible to purchase the required credits from the landholder.

The applicant must provide evidence to the consent authority or the Native Vegetation Panel that it was not feasible for the applicant to purchase relevant credits from any of the people who contacted the applicant within the timeframe, or the applicant must provide evidence that agreement could not be reached within the 120-day period from the offset search start date.

4. Documentation

For the purposes of section 3, the following documents and process are required where relevant to establish completion of the reasonable steps.

4.1 Evidence to be provided by the applicant

The applicant must provide:

1. dated copies of all relevant correspondence (which can include electronic) with credit holders and other relevant persons on public registers, and
2. evidence of unsuccessful negotiations with credit holders/landholders, including all offers provided and the specific reasons why an offer was rejected or why a site was determined to be unfeasible.

4.2 Evidence that negotiations are conducted in good faith

The actions below are evidence of negotiations conducted in good faith:

1. Every offer made by the applicant is consistent with, or above, the market price for the same type or a similar type of credits in the same Interim Biogeographic Regionalisation for Australia (IBRA) subregion.
2. Market price can be demonstrated using the biodiversity credit price component of the Offsets Payment Calculator, through the applicant's analysis of credits trades or any other method the consent authority or Native Vegetation Panel agrees is relevant.
3. The applicant has demonstrated continual involvement in the negotiations with responses provided by the applicant within a reasonable timeframe.
4. Negotiations are not concluded until the applicant can demonstrate that it is not feasible to purchase the relevant credits, or at 120 days from the offset search start date.

4.3 Evidence that credits or potential sites are unfeasible

The following factors are accepted as evidence:

1. the applicant has evidence to demonstrate that the relevant credit holder or landholder is not interested in providing credits to the applicant, either through a lack of response within 90 days from the offset search start date or through a statement from the relevant credit holder or landholder that they are unwilling to continue the negotiation process, or
2. it becomes evident that the site does not contain the biodiversity values required to generate the relevant credits, or
3. the price of the relevant credits proposed to be charged by the credit holder or landholder is significantly above market prices, and the credit holder/landholder has indicated they will not reduce their price.