Environmental Protection (Commercial Cropping and Horticulture Activities in Great Barrier Reef Catchment) Amendment Regulation 2021

Explanatory notes for SL 2021 No. 42

made under the *Environmental Protection Act 1994*

General Outline

Short title

Environmental Protection (Commercial Cropping and Horticulture Activities in Great Barrier Reef Catchment) Amendment Regulation 2021

Authorising law

Section 580 of the *Environmental Protection Act 1994*

Policy objectives and the reasons for them

The primary objective of the *Environmental Protection (Commercial Cropping and Horticulture Activities in Great Barrier Reef Catchment) Amendment Regulation 2021* (the Amendment Regulation) is to support the Reef protection regulations by:

- prescribing an environmentally relevant activity (ERA) standard for commercial cropping and horticultural in the Great Barrier Reef catchment (ERA 13A); and
- clarifying the policy intent for certain provisions as a result of consultation on the ERA standard, including simplifying where ERA 13A does not apply to.

The Reef protection regulations strengthened the existing Great Barrier Reef protection regulations to improve the quality of the water entering the Great Barrier Reef. The regulations included the *Environmental Protection (Great Barrier Reef Protection Measures) and Other Legislation Amendment Act 2019* (GBR Act) and the *Environmental Protection (Great Barrier Reef Protection Measures) and Other Legislation Amendment Regulation 2019* (Subordinate Legislation 2019 No. 234).

The Explanatory Notes to the GBR Act included the reasons for the suite of changes under the Reef protection regulations. This Amendment Regulation supports achievement of the policy objectives of the GBR Act.

The Amendment Regulation also has the objective of returning the devolved responsibilities of Banana Shire Council for the administration and enforcement of particular prescribed ERAs under section 133 of the *Environmental Protection Regulation 2019* (EP Regulation) to the State Government.

Achievement of policy objectives

The policy objective will be achieved by amending the EP Regulation to:

- approve an ERA standard for commercial cropping and horticulture in the Great Barrier Reef catchment (ERA 13A);
- simplify and clarify which land the definition of ERA 13A does not apply to;
- clarify the intent of particular provisions; and
- include Banana Shire Council as an 'other local government' in Schedule 13.

Clause 2 states that this Amendment Regulation commences on 1 June 2021. This ensures the amendments are in place at the commencement of the requirements for 'no net decline' in Great Barrier Reef water quality from new or expanding agricultural, industrial (other prescribed ERAs) and resource activities.

ERA standard for commercial cropping and horticulture in the Great Barrier Reef catchment

The *Environmental Protection (Great Barrier Reef Protection Measures) and Other Legislation Amendment Regulation 2019* introduced ERA 13A as a prescribed ERA in Schedule 2 of the EP Regulation. From 1 June 2021, a person who wants to undertake commercial cropping or horticulture on more than five hectares of land in the Great Barrier Reef catchment that is not subject to an existing cropping activity, is required to obtain an environmental authority. The environmental authority will be subject to conditions that will require the farm to be set up and maintained in a way that minimises the release of sediment and nutrients from the farm into the water, or catchment waters, of the Great Barrier Reef. If an agricultural ERA standard (section 81 of the *Environmental Protection Act 1994* (EP Act)), which contain minimum practice agricultural standards and general record keeping requirements for an activity, applies to the commodity being grown, the person must also comply with these standards.

Under section 318 of the EP Act, the chief executive may make a standard for the eligibility criteria and standard conditions for an ERA (known as an 'ERA standard'). An ERA standard has been made for ERA 13A in accordance with sections 318A and 318B of the EP Act (consultation results are detailed below).

The ERA standard will make the application and assessment process simpler and quicker for growers who can meet the eligibility criteria (commercial cropping or horticulture on no more than 100 hectares, or banana cultivation that is being relocated due to the presence of Panama disease tropical race 4 on other land for which a notice has been given under the

Biosecurity Act 2014 (Qld)). These growers will be eligible to make a 'standard' or 'variation' application for an environmental authority.

The standard application:

- gives certainty to growers on the conditions that they will be required to comply with and on the outcome of the application process (as the administering authority must approve a standard application under section 170 of the EP Act);
- cost less in application fees;
- reduces regulatory burden as an applicant does not need to provide site-specific information with their application and can only be subject to pre-set conditions; and
- takes less time to be assessed and decided.

The ERA standard contains outcomes-focused conditions which allow growers to pursue flexible, innovative and cost-effective management techniques for achieving the specified water quality outcomes.

Where the eligibility can be met but a standard condition needs to be changed, a 'variation application' can be made to vary one or more standard conditions. The assessment process for these applications is limited to the variation only. Where the eligibility criteria cannot be met, a site-specific application must be made for the environmental authority. The types of application and process for each type is found in Chapter 5 of the EP Act.

The Amendment Regulation gives effect to the new ERA standard by including the ERA standard in the list in Schedule 7, Part 2 of the EP Regulation.

Simplify and clarify which land ERA 13A does not apply to

Under the definition of ERA 13A in Schedule 2, the relevant activity does not include cropping or horticulture activities on land where there is a 'cropping history'. The policy intent of this cropping history exclusion, as stated in the explanatory notes for the *Environmental Protection (Great Barrier Reef Protection Measures) and Other Legislation Amendment Regulation 2019*, is to limit the burden on growers having to retrofit the farm design standards to existing cropped areas.

The current cropping history exclusion requires two elements to be satisfied:

1. the land must have been cropped for one of the last five years; and
2. for three out of the last ten years before the new cropping will commence.

This means the maximum fallow period is four years before commercial cropping or horticulture on the land is an ERA 13A activity for which an environmental authority is required.

During consultation on the ERA standard, growers raised concerns that existing cropping lands, particularly in dryland cropping areas and areas affected by drought, will not meet the cropping history exclusion. Growers in many drought affected areas have been unable to crop, with gaps between cropping cycles now extending beyond four years. Fallow periods or spelling for some crops (e.g. ginger, sweet potato) may also be longer than four years as a method to address soil pathogens.

In response to consultation, the Amendment Regulation amends schedule 2, section 13A(4) of the EP Regulation to remove the first element of the cropping history definition (one in the last five years). This amendment will ensure the policy intent, that ERA 13A is not to apply retrospectively to existing cropping land, is able to be met. Subsection (3) means that ERA 13A will apply to land that has not been used for cropping or horticulture in 3 out of the last 10 years before the grower is proposing to start the 'new' cropping activity.

Clause 8 amends the cropping history exclusion in Section 13A of schedule 2 to clarify that the historical cropping may have been undertaken for either commercial or non-commercial purposes. This amendment allows for non-commercial crops, such as fodder crops grown to feed a grazier's own cattle, to count towards the cropping history. This amendment is consistent with the policy intent for the cropping history exclusion.

Clause 8 also amends Section 13A of schedule 2 to clarify that once commercial cropping and horticulture is undertaken on land under an environmental authority, the cropping history exclusion no longer applies. This amendment ensures that once an environmental authority is obtained, the commercial cropping or horticulture activity will continue to be an ERA 13A activity, even once the land has been cropped in three years (which is long enough to meet the cropping history exclusion). This fixes an unintended loophole which would result in an environmental authority no longer being required for land once the cropping history exclusion is met.

Clause 8 further amends section 13A of schedule 2 to remove 'single enterprise' given existing provisions of the EP Act address who needs to obtain an environmental authority (section 426), who may apply (section 116), when a single application for an environmental authority is required (section 118), and when a single environmental authority is required (section 119). Consequential amendments are made to retain the intent that cropping or horticulture must be on at least five hectares of land within the same river basin in the Great Barrier Reef catchment, regardless of whether the land is adjoining.

Clarification of intent

Clause 4 of the Amendment Regulation amends section 41AA of the EP Regulation to clarify that new development or intensification of use for prescribed ERAs and resource activities can counterbalance a residual impact of fine sediment, or dissolved inorganic nitrogen, in the water, or catchment waters, of the Great Barrier Reef by using *offset measures*. The amendment clarifies that where offset measures will be used to counterbalance a residual impact, they will be guided by the Department of Environment and Science's (DES) 'Point Source Water Quality Offsets Policy 2019' and included as a condition on the environmental authority. This amendment is required because interpretation of section 41AA of the EP Regulation would result in an offset measure not being able to be used because dissolved inorganic nitrogen and fine sediment would remain in the water. This amendment is consistent with the policy intent stated in the explanatory notes for the *Environmental Protection (Great Barrier Reef Protection Measures) and Other Legislation Amendment Regulation 2019*.

Clause 4 may be seen to interact with the *Legislative Standards Act 1992*, section 4(3)(a) which states that legislation should make rights and liberties, or obligations, dependent on administrative power only if the power is sufficiently defined and subject to appropriate

review. The amendments to section 41AA made by Clause 4 clarify that the administering authority will decide whether an offset measure adequately counterbalances a residual impact taking into account the Point Source Water Quality Offsets Policy 2019. It could be argued that the document does not specify ratios or measures for every environmental authority scenario, meaning the administering authority will decide whether a residual impact is adequately counterbalanced by applying different delivery or equivalency ratios depending on the site-specific circumstances. The lack of objective criteria can be justified by the need for flexibility given the range of site specific scenarios section 41AA could apply to, and the highly technical nature of the content. Further, the document is a readily available document, published on DES' website and is subject to consultation processes when reviewed.

Section 41AA is also amended to clarify that fine sediment is measured as total suspended solids for the purposes of determining whether there will be a residual impact because of the activity. This is consistent with how fine sediment is measured for the purposes of the *Reef 2050 Water Quality Improvement Plan 2017-2022* and the 'Great Barrier Reef River Basins: End-of-Basin Load Water Quality Objectives', which is made under the *Environmental Protection (Water and Wetland Biodiversity) Policy 2019*.

An amendment is made to section 183 of the EP Regulation to clarify interpretation of the annual fee exemption for ERA 13A. The amendment clarifies that the holder of an environmental authority for ERA 13A is only exempt from the annual fee when ERA 13A is the only ERA carried out under the environmental authority. When ERA 13A is undertaken as part of an ERA project that includes other ERAs, the holder of the environmental authority will be required to pay the annual fee applicable to the other ERAs on the environmental authority in accordance with section 157 of the EP Regulation.

The Amendment Regulation omits section 217 which is replaced by new sections 224 and 225 (clause 7). The revised transitional provision clarifies that the cropping or horticulture undertaken on the land at any time between 1 June 2018 and 31 May 2021 (inclusive) applies if undertaken either commercially or non-commercially. This means that ERA 13A does not apply to land that has been cropped commercially or non-commercially (including preparatory work) at any point between 1 June 2018 and 31 May 2021, and that does not yet meet the cropping history, until 1 June 2026. This effectively gives a person who is cropping their land at 1 June 2021, or in the three years prior, another five years to develop a cropping history. This amendment is required to meet the policy intent set out in the explanatory notes for the *Environmental Protection (Great Barrier Reef Protection Measures) and Other Legislation Amendment Regulation 2019* that there is no potential for retrospective application of the farm design requirements to an existing cropping activity.

The Amendment Regulation also amends schedule 15, section 5 to clarify interpretation of the fees for ERA 13A for a variation application, site-specific application and major amendment application. The amendment clarifies that the fees set out for ERA 13A only apply when ERA 13A is the only ERA included on the application. When ERA 13A is included on an application as part of an ERA project with other ERAs, the applicant will be required to pay the fees applicable to the other ERAs on the application.

Including Banana Shire Council in Schedule 13

The Amendment Regulation amends Schedule 13 to include Banana Shire Council, classifying it as an 'other local government'. Banana Shire Council is currently a prescribed local government for section 133 of the EP Regulation.

Section 133 devolves the administration and enforcement of particular prescribed ERAs to a prescribed local government, where the activity is, or is to be, carried out in its local government area. A prescribed local government means a local government, other than a local government mentioned in Schedule 13. The particular prescribed ERAs under section 133 are not devolved to local governments that are listed in Schedule 13. These local governments have very few, or none, of the particular prescribed ERAs in their local government area, and having these local governments maintain the processes and systems for the administration of these ERAs is unviable.

Banana Shire Council currently has none of the particular prescribed ERAs under their administration. This enables the inclusion of Banana Shire Council in Schedule 13, returning its responsibilities for the administration and enforcement of particular prescribed ERAs to the State Government.

Consistency with policy objectives of authorising law

The Amendment Regulation is consistent with the object of the *Environmental Protection Act 1994*, which is to protect Queensland's environment while allowing for development that improves the total quality of life, both now and in the future, in a way that maintains the ecological processes on which life depends (ecologically sustainable development).

Inconsistency with policy objectives of other legislation

The Amendment Regulation is consistent with the policy objectives of other legislation.

Benefits and costs of implementation

Costs and benefits of implementation of the Reef protection regulations were comprehensively examined as part of the regulatory analysis for the GBR Act.

The ERA standard reduces the regulatory burden to growers than previously estimated as the threshold for the eligibility criteria was increased from 30 hectares to 100 hectares to accommodate stakeholder feedback that the threshold was too small. In addition, a second eligibility criteria were included to allow for banana cultivation that is being relocated due to the presence of Panama disease tropical race 4 on other land for which a Notice has been given under the *Biosecurity Act 2014* (Qld). This will decrease the number of site-specific applications, which reduces the assessment burden on government.

This regulation will continue to deliver the objective of 'no net decline' in water quality from new agricultural development. This is because the farm design standards will still apply to all environmental authorities for ERA 13A and new cropping under 100 hectares will still be subject to set conditions to address risks to water quality.

Removing the 'one in the last five years' component from the cropping history exclusion will make the requirement easier for growers to comply with and for the administering authority to enforce. The environmental impacts are unlikely to be significant because new cropping land will continue to be captured and conditioned under an environmental authority. Minimum practice agricultural ERA standards also continue to apply to key commodities.

The amendments to the provisions for annual fees and environmental authorities will not have any financial impacts as the amendments only clarify which fees in the EP Regulation apply when ERA 13A is undertaken as part of an ERA project.

The other amendments in this Amendment Regulation are considered minor in nature and will not have any additional adverse impacts on government or other stakeholders to what was covered by through the regulatory assessment on the GBR Act.

Consistency with fundamental legislative principles

The Amendment Regulation is consistent with fundamental legislative principles outlined in Section 4 of the *Legislative Standards Act 1992*. The Explanatory Notes for the GBR Act detail how the legislation has had sufficient regard to the rights and liberties of individuals.

Consultation

Since August 2016, the Department of Environment and Science (DES) has undertaken extensive consultation on the Reef protection regulations with peak agricultural and industrial representative bodies and individual producers, conservation groups, local governments, and Natural Resource Management bodies.

Consultation occurred on the ERA standard for commercial cropping and horticulture in the Great Barrier Reef catchment in accordance with section 318A of the EP Act. The proposed ERA standard was initially published on DES's website for consultation in early 2020. Due to the COVID-19 pandemic, this public consultation process was suspended in April 2020 and the commencement of the requirements to achieve 'no net decline' in water quality from new development in the Great Barrier Reef catchment was postponed to 1 June 2021.

The ERA standard was subsequently updated based on stakeholder feedback received during this initial public consultation process. The updated ERA standard was then made available on DES's website for public consultation between 16 December 2020 and 17 February 2021, with written public submissions sought through the Office of the Great Barrier Reef (OGBR) inbox.

The consultation approach included 24 consultation sessions held from 12 January to 8 February 2021 which were attended by approximately 380 people. This included face-to-face sessions in the six Great Barrier Reef regions and virtual sessions available to the public, including growers and agricultural advisers. Sessions also included meetings with peak agricultural groups (e.g. AgForce, Australian Banana Growers Council, Australian Sugar Cane Farmers Association, Australian Sugar Milling Council, Canegrowers, Fertilizer Australia, Growcom and Sugar Research Australia), conservation groups (e.g. Australian Marine Conservation Society, Burnett Catchment Care Association, Capricorn Conservation Council, Environmental Defenders Office, Gladstone Conservation Council and Wide Bay Burnett Environment Council) and natural resource management (NRM) groups (e.g. Burnett Mary Regional Group, Cape York NRM, Fitzroy Basin Association, NQ Dry Tropics and Reef Catchments).

Feedback received during the sessions was recorded as submissions and analysed along with the 45 written submissions received in the OGBR inbox. The ERA standard was amended in response to feedback on the eligibility criteria and standard conditions that were within scope.

In March 2021, meetings were held with peak industry groups and conservation sector groups to inform them of the changes being made in response to the feedback received. DES also prepared a consultation report which will be made publicly available on its website.

In addition to feedback related to the ERA standard and the EP Regulation, feedback was received on how the requirements will be implemented. The lack of awareness or understanding of the Reef protection regulations, and the environmental authority application process, was evident by the number of questions and requests for information that is easily accessible and could be easily understood by growers. There were requests for simplification of language and content, and support from DES to prepare applications. Also, growers raised concerns regarding the enforcement approach DES will be using. This feedback is being addressed by DES through design of communication and implementation materials, as well as a next phase of information sessions, planned to be delivered across the six Great Barrier Reef regions (COVID-19 permitting).

Feedback on the broader Reef protection regulations was also received. The conservation sector strongly supports the regulations. In contrast the agricultural sector disagree a permit should be required. This was evident by the number of submissions that explicitly requested exclusions from the regulation, either by excluding regions (such as Burnett-Mary and Cape York), commodities (such as sugarcane) and activities (such as seed harvesting and nursery tree planting). Arguments against needing a permit included concerns raised with fairness against other industries (such as grazing, solar farms and government owned lands (national parks and forestry)), whether there is an overlap with other legislation such as the *Vegetation Management Act 1999* and *Water Act 2000*, and whether there is sufficient scientific evidence that supports a regulatory approach. The Queensland Government is committed to implementing the Reef protection regulations across the six Great Barrier Reef regions. Therefore, no further exclusions to those made by the *Environmental Protection (Great Barrier Reef Protection Measures) and Other Legislation Amendment Regulation 2019* have been made at this time.

Requests to acknowledge best management practice (BMP) programs and accredited growers by exempting growers from the permit requirement or consider BMP accreditation in the site specific application process were received. In addition, concerns on publicly available information by the Public Register under the EP Act were also received. These matters relate to primary legislation considerations, which will be further explored by Government.

In accordance with *The Queensland Government Guide to Better Regulation* (the Guidelines), the Office of Best Practice Regulation (OBPR) was consulted on the Amendment Regulation.

In accordance with the Guidelines, OBPR was not consulted on the amendment to include Banana Shire Council in schedule 13 to classify it as an ‘other local government’. DES applied a self-assessable exclusion under category (c)—regulatory proposals for the internal management of the public sector or statutory authority.

OBPR advised that all the other amendments are excluded from further regulatory impact analysis under the Guidelines (Category k—“regulatory proposals designed to reduce the burden of regulation, or that clearly do not add to the burden, and it is reasonably clear there are no significant adverse impacts”).