



## Comments to Consultation

From: Climate Focus  
Subject: **Harmonisation of the application of Art. 11b(6)**  
Date: 6 June 2008

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We appreciate the opportunity to submit our views on the draft documents prepared by the *Ad hoc* Working Group of Working Group 3 (Emissions Trading of the Climate Change Committee and the Commission) proposing the harmonization of approval procedures by Member States applicable to CDM hydroelectric project activities with generating capacity above 20 MW.

We certainly see this harmonization effort as an important step toward the conclusion of a uniform and clear set of CDM/JI approval procedures which is capable of reducing market uncertainty and securing compliance with generally acceptable environmental standards for hydropower projects. Our comments and suggestions are outlined below.

### **Article 11b(6) requirements**

Article 11b (6) states: *“In the case of hydroelectric power production project activities with a generating capacity exceeding 20 MW, Member States shall, when approving such project activities, ensure that relevant international criteria and guidelines, including those contained in the World Commission on Dams November 2000 Report “Dams and Development – A New Framework for Decision-Making”, will be respected during the development of such project activities.”*

### **Problem**

Article 11b(6) leaves great margin of appreciation for Member States to decide on how compliance with the relevant international criteria should be observed and properly demonstrated. Some of the main issues which stem from the lack of clear regulations and harmonised procedures are listed below:

- (i) it is unclear how Member States can “ensure” that the relevant international guidelines will be respected as States hardly have the means to supervise projects beyond the one-off approval performed by DNAs;
- (ii) it is unclear what will be the general treatment for hydropower projects approved by Annex I countries other than EU Member States. Harmonization of rules is not only necessary at the project approval level, but also at CER recognition and acceptance stage;
- (iii) confusion is created by the definition of large hydro projects. While the ETS defines large hydropower projects as those with generating capacity above 20



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MW, the WCD guidelines defines the large projects according to the height of the dam and reservoir volume;

- (iv) the applicability of other relevant criteria and guidelines is not clear (beyond a reference to the World Bank safeguards in the Explanatory Memo).

## **Proposed EU harmonization**

### *Scope*

The guidelines presented by the Working Group clarify the types of hydropower projects which must undergo the sustainability assessment required by Article 11b(6) of the ETS Directive.

Insecurities remain with respect to bundled CDM projects as the guidance issued to Member States is ambiguous when it states that the guidance applies to bundled projects that have an aggregated generation capacity of 20MW, but it does not apply to projects where there is no technical or environmental link between them. The existence of a “*technical or environmental link*” should be further clarified and clearly distinguished from the alleged existence of such link in the case of bundled CDM projects. We encourage the adoption of clear objective criteria to determine the existence of any such technical or environmental link.

### *Acceptance of Compliance Report*

As per the draft documents, it is unclear whether DNAs would be able to deny issuance of a Letter of Approval for projects which have successfully validated the Compliance Report. We believe that it is important that project developers and investors be assured that a duly validate Compliance Report is enough to demonstrate compliance for the purposes of Article 11b(6). Countries that adopted the harmonized procedure should subscribe to it and accept the positive opinion of the certifying auditor regarding the compliance of the project activity with the relevant criteria.

The same observation applies to the comment that DNAs may add additional criteria at its own discretion to the compliance assessment. Ideally, once a Member State (or its DNA) has consented to a common set of approval procedures, it should refrain from unilaterally imposing any additional restrictions. Any unilateral action would put at risk the harmonization efforts made and bring back the undesired uncertainty to the market.

### *Independent verification*

We support the participation of independent auditors in the verification of compliance with the criteria established in the Compliance Report. Assigning the responsibility to assess compliance with the Report from DNAs to independent parties is likely to be the preferred option for a harmonization of approval procedures. The clear advantages are:



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- (i) compliance with the Report is checked simultaneously with CDM validation, therefore, optimizing review time and reducing the uncertainty which would be brought with an additional layer of approval at the DNA level;
- (ii) Annex-I DNAs remain within the boundaries of the role assigned to them under the Kyoto Protocol, i.e., to ensure voluntary participation and authorise the involvement of private and/or public entities in the CDM project.

However it is important that auditors perceive the criteria in the Compliance Report as sufficiently concrete to allow proper verification and auditing. Making use of the WCD and other international guidelines as a basis for assessing compliance with the requirements of Article 11b(6) of the Directive is a workable alternative, provided that the assessment criteria is translated into measurable parameters of compliance and that verifiers are in agreement with such parameters.

### *Conditional LoAs*

We would like to express our concerns however with the possibility opened to DNAs to issue conditional Letters of Approval. According to paragraph 8, section 2 (“Approval Procedures”), “*Member States may issue LoA with requirements regarding monitoring of compensatory measure*” of the Commission’s non-paper. The inclusion of any such condition in LoAs is problematic for a number of reasons:

1. The Executive Board has decided not to accept conditional Letter of Approvals.<sup>1</sup> Even though some non-Annex I countries have granted conditional approvals, this practice is in conflict with the decisions of the CDM Executive Board, a practice that should not be endorsed by the EU as it affects the credibility and standing of the Board and affects the confidence of project participants in the robustness of EB decisions negatively.
2. It is not clear how Member States could enforce conditions imposed by a Letter of Approval. EU Member States cannot bind project developers in non-Annex I countries and oblige them to undertake certain actions. They are thus limited in their reach to EU project participants. If a Member State demands corrective action on the basis of an approval issued, it is not clear whether and how the Annex I project participant can ensure compliance, in particular of the project participant’s relationship with the project is one of an arms-length’s trade. In that case the Member State’s sole sanction is to revoke the Letter of Approval. Such recall of an international approval is not foreseen by the international CDM/JI procedures and is likely to result in an international dispute between the project participants and/or the Parties involved. Legal theory confirms that a Letter of Approval has a dual nature when it combines a national approval and authorization with a unilateral statement under international law. The revoking of the latter affects the relationship between the Parties involved in a certain project activity and can have legal consequences under international law.

In the same context but of more general nature, it is arguable how Member States can at all “*ensure*” that every project involving hydroelectric power production facilities with generating

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<sup>1</sup> CDM Glossary of Terms, Version 03.



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capacity above 20 MW complies with the EU criteria. Since neither the Member State nor, in the absolute majority of the cases, the Annex I project participant have direct influence on the project, the Member State can according to our view and experience only “*verify*” compliance but not ensure an ongoing compliance with these standards.

### *Other international standards*

The Commission’s paper is referring to the WCD guidelines as the only applicable guidelines according to Article 11(b)(6), while the text of the directive and the relevant explanatory memorandum refer to “*relevant international criteria and guidelines*” which include, but are not limited to the WCD guidelines. The relevant international criteria and guidelines include, according to relevant communications of the EU Commission, the World Bank safeguards for hydroelectric projects but could also include other standards. It is not clear whether the harmonized procedure tries to operationalize the WCD guidelines only or whether it would also apply to projects that underwent extensive design and development due diligence as in the case of World Bank or other comparable project.