

**Earthjustice Comments on the
Draft Procedures for Requests for Registration and Requests for Review of a Proposed
CDM Project Activity, and Requests for Issuance and Requests for Review of Certified
Emission Reductions**

Earthjustice respectfully submits the following comments in response to the CDM Executive Board's call for public input on the draft "*Procedures for Requests for Registration of a Proposed CDM Project Activity*," the draft "*Procedures for Review for Requests for Registration*," the draft "*Procedures for Requests for Issuance of Certified Emission Reductions*," and the draft "*Procedures for Review for Requests for Issuance*."

The specific focus of our comments is the need to ensure greater transparency and integrity in the CDM by guaranteeing a full and meaningful opportunity for the public to participate in decisions related to CDM project registration and the issuance of Certified Emission Reductions ("CERs"). Doing so is consistent not only with the mandates of Decision 2/CMP.5, but international legal principles as well. Enhanced public participation will serve to improve the overall administration and integrity of the CDM project approval process, help to avoid unnecessary appeals, and enhance the international community's overall trust in the CDM. Specifically, we believe that the procedures would benefit from the following changes and additions:

- Providing the public with greater access to information related to requests for registration of CDM project activities and issuance of CERs by publishing all information and related documents on the UNFCCC website and notifying members of the public or NGOs of the request via mailing lists to which they can subscribe.
- Affording the public the right to request a review of requests for registration of proposed CDM project activities and requests for issuance of CERs.

I. INTRODUCTION

In requesting that the CDM Executive Board ("EB") revise its procedures for registration of CDM projects and issuance of CERs there from, the Conference of the Parties Serving as the Meeting of the Parties to the Kyoto Protocol ("CMP") specifically called on the EB to enhance transparency and public participation in the process. Specifically, the CMP requested that the EB, "as its highest priority, continue to significantly improve transparency, consistency and impartiality in its works by, ...[t]aking into account input from relevant international organizations ...in its decision-making process." Decision 2/CMP.5, ¶ 7(c)(emphasis added).

The clear benefits of public participation in environmental decision-making is well recognized under international law. As set forth in Principle 10 of the 1992 Rio Declaration on Environment and Development, agreed to at the UN Conference on Environment and Development ("UNCED"),

Environmental issues are best handled with the participation of all concerned citizens, at the relevant level. At the national level, each individual shall have

appropriate access to information concerning the environment that is held by public authorities,..., and the opportunity to participate in decision-making processes. States shall facilitate and encourage public awareness and participation by making information widely available. Effective access to judicial and administrative proceedings, including redress and remedy, shall be provided.¹

At the World Summit on Sustainable Development in Johannesburg (South Africa, 2002), the goal of which was to review the 1992 UNCED at the Summit level to reinvigorate global commitment to sustainable development, 191 governments further reaffirmed the central role that broad-based stakeholder participation should play in promoting sustainable development. In particular, the parties recognized that public input is vital at all levels of policy development and project decision-making.² The right of the public to participate was further recognized in the 1998 UNECE Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters (“Aarhus Convention”) provides:

[E]very person has the right to live in an environment adequate to his or her health and well-being...Considering that, to be able to assert this right and observe this duty, citizens must have access to information, be entitled to participate in decision-making and have access to justice in environmental matters, and acknowledging in this regard that citizens may need assistance in order to exercise their rights ...each Party shall guarantee the rights of access to information, public participation in decision-making, and access to justice in environmental matters....³

¹ 1992 Rio Declaration on Environment and Development, *available at* <http://www.unep.org/Documents.Multilingual/Default.asp?DocumentID=78&ArticleID=1163>.

² World Summit on Sustainable Development [WSSD]. Aug 26 – Sep.4 2002, Political Declaration, par 26. (Sep 4, 2002), *available at* http://www.un.org/esa/sustdev/documents/WSSD_POI_PD/English/POIToc.htm. The declaration states that all parties “recognize that sustainable development requires a long-term perspective and broad-based participation in policy formulation, decision-making and implementation at all levels.” *See also*, WSSD Plan of Implementation, par 128. In the plan, parties agree to “[e]nsure access, at the national level, to environmental information and judicial and administrative proceedings in environmental matters, as well as public participation in decision-making, so as to further principle 10 of the Rio Declaration on Environment and Development.” *See also* United Nations Environment Program Malmo Declaration of the Global Ministerial Environment Forum. May 28 – May 31, 2000. (June 1 2000), *Available at* http://www.unep.org/malmo/malmo_ministerial.htm. The Malmo conference was held in pursuance of United Nations General Assembly resolution 53/242 of 28 July 1999 to enable the world’s environment ministers to gather to review important and emerging environmental issues and to chart the course for the future, and over 100 of the world’s environmental ministers attended. Paragraph 16 of the declaration states that “[t]he role of civil society at all levels should be strengthened through freedom of access to environmental information to all, broad participation in environmental decision-making, as well as access to justice on environmental issues. Governments should promote conditions to facilitate the ability of all parts of society to have a voice and to play an active role in creating a sustainable future.”

³ United Nations Economic Commission for Europe [UNECE], Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters preamble, art. 1, June 25, 1998, *available at* <http://www.unece.org/env/pp/documents/cep43e.pdf>.

These principles are based on the recognition that the public plays an important role by drawing to the attention of decision-makers to concerns, errors, inaccuracies or facts that were overlooked, thereby acting as an extra check on the processes that will impact the environment. At the same time, introducing transparency and allowing public input into the process serves to eliminate distrust in the decision-making process, and the decision-makers themselves.

Allowing the public to participate during the CDM registration process would further serve to improve the overall administration of the CDM and help to avoid unnecessary appeals. In Decision 2/CMP.5, the CMP made clear that the EB should introduce a public appeals process into the CDM project approval procedures. While paragraph 39 of the Decision requires the EB to revise the procedures for registration and review of CDM projects, paragraph 42 further states that the EB should establish “procedures for considering appeals that are brought by stakeholders directly involved, defined in a conservative manner, in the design, approval or implementation of the [CDM] project activities..., in relation to:...(b) Rulings taken by or under the authority of the Executive Board in accordance with the procedures referred to in paragraph 39 above regarding the rejection or alternation of requests for registration or issuance.” Decision 2/CMP.5, ¶¶ 39, 42. Thus, the proposed draft procedures that are the subject of these comments and that were drafted by the EB pursuant to Decision 2/CMP.5 ¶ 39 are required to include procedures for stakeholder appeals. We assume for the purpose of these comments that the procedures for a stakeholder appeal process referred to in paragraph 42 will be drafted separately, and that the public will be provided an opportunity to comment on those procedures. Nonetheless, the CMP’s recognition that the public or stakeholders should be afforded an opportunity to appeal registration and issuance decisions is relevant to these procedures as well. The sooner that interested parties get involved in the process, the better. Providing them with input and an opportunity to participate in the registration approval process at the early stages of review avoids later appeals that will only serve to further delay the process.

II. COMMENTS AND RECOMMENDATIONS

A. Draft Procedures for Requests for Registration of a Proposed CDM Project Activity

1. The Request for Registration and all Required Documents Should Be Published on the UNFCCC Website and Interested Parties Notified of the Request

Pursuant to the *Draft Procedures for Registration of a Proposed CDM Project Activity* (“Draft Procedures for Registration”), the DOE is required to submit the documents listed in the latest version of the *Guidelines on Completeness Check of Request for Registration*.⁴ Draft Procedures for Registration, ¶ 6. These required documents include: (a) the CDM project design document (“PDD”); (b) the validation report; (c) a valid letter of approval from each Party involved; (d) a letter of authorization for each project participant; (e) a modalities of communication form; (f) a registration request form; and (g) additional annexes to the PDD providing further details and/or supporting evidence related to the additionality of the project activity, the baseline, and the emission reduction calculations. Guidelines, ¶ 8.

⁴ The required documents are listed in paragraph 8 of the “Guidelines on Completeness Checks of Requests for Registration.” EB 48 report, annex 60.

The Draft Procedures for Registration provide that once the secretariat confirms that the request for registration submission is complete, it must “publish the proposed project activity on the UNFCCC website.” Draft Procedures for Registration, ¶ 11. However, the new procedures fall significantly short of those contained in the prior procedures that they will replace. *See* Draft Procedures for Registration, ¶ 3. Pursuant to the prior, now-revoked, Procedures for Registration:

In order to ensure transparency and efficiency of the registration process:... (c) A request for registration” (as defined in paragraph 40 (f) of the CDM modalities and procedures) shall be made publicly available through the UNFCCC CDM web site (either by a link to the DOE web site or by being directly posted) for a period of eight (8) weeks. The secretariat shall announce a request for registration of a proposed CDM project activity on the UNFCCC CDM web site and in the CDM news facility. The announcement shall specify where the request for registration can be found, the name of the proposed CDM project activity and the first and last day of the eight-week period. The secretariat shall notify the DOE requesting a registration when and where the request for registration is posted.

However, these same requirements are not included in the proposed Draft Procedures for Registration. Therefore, in order to ensure that these safeguards remain intact under the new procedures, *we recommend that the Draft Procedures be revised to specify (1) that the request be made publicly available by announcing the request for registration on the UNFCCC CDM website and in the CDM news facility; (2) that the announcement specify where the request for registration can be found, the name of the proposed CDM project activity and the first and last day of the review period; and (3) that along with the request for project registration, the secretariat must publish on the website the accompanying required documents.* This is important to ensure that the public has access to relevant information, and that the “information related to the demonstration of additionality and determination of the baseline [are] provided in a transparent manner.” Guidelines, ¶ 9(b). *In addition, members of the public or NGOs should be notified of the request for project registration via mailing lists to which they can subscribe.*⁵

2. *The time for parties to request review should be extended from 28 to 42 days after publication of the request for registration.*

The current timeline for requesting a review is eight weeks (56 days). *Modalities and procedures for a clean development mechanism as defined in Article 12 of the Kyoto Protocol*

⁵ The Draft Procedures also propose to replace the document entitled “Clarifications on the Validation Requirements to be checked by the DOE.” However, the revised procedures omit important safeguards contained in that document, such as paragraph 2(b), which provides: “An invitation for comments by local stakeholders shall be made in an open and transparent manner, in a way that facilitates comments to be received from local stakeholders and allows for a reasonable time for comments to be submitted. In this regard, project participants shall describe a project activity in a manner which allows the local stakeholders to understand the project activity, taking into account confidentiality provisions of the CDM modalities and procedures.” The EB should ensure that these provisions are retained in the new procedures or other EB guidance.

(“CDM Modalities and Procedures”), Decision 3/CMP.1, Annex, ¶ 41. The Draft Procedures for Review propose to cut this time in half, and require Parties and EB board members to request review within 28 days (21 days in the case of small-scale project activities). Draft Procedures for Registration, ¶ 8. In the interest of providing adequate time to review requests, while recognizing the need to expedite the process, we recommend that *this period for requesting review should be extended from 28 days to 42 days, and from 21 days to 28 days.*

3. The Public Should Be Afforded the Opportunity to Request Review of Registration Requests.

The Draft Procedures for Registration provide that the EB shall register a proposed CDM project activity if the secretariat does not receive a request for review from a Party involved or at least three members of the EB. Draft Procedures for Registration, ¶ 14. As discussed in greater detail below, we recommend that the procedures be revised to afford the public the opportunity to request a review.

B. Draft Procedures for Requests for Review of a Proposed CDM Project Activity

The EB is also soliciting comments on its *Draft Procedures for Review of a Proposed CDM Project Activity* (“Draft Procedures for Review”). In revoking the existing procedures and asking the EB to issue revised procedures, the CMP specified that the Board must ensure that the revised procedures: (a) Provide designated operational entities and project participants with adequate opportunity to address issues raised in reviews; (b) Include an independent technical assessment of the analysis conducted by the secretariat; (c) Include a process for the Executive Board to consider objections raised by members of the Executive Board to outcomes of assessments; (d) Ensure efficient and timely consideration of registration and issuance requests.” Decision 2/CMP.5, ¶ 39.

The Draft Procedures for Review elaborate on the provisions above “in particular by specifying detailed provisions for requesting a review, the elaboration and consideration of the review, modalities for communicating with project participants and the designated operational entity (DOE) in question, possible outcomes of a review, and the coverage of costs relating to the review.” Draft Procedures for Review, ¶ 4.

1. The Public Should be Afforded the Right to Request Review

The Draft Procedures for Review limit the right to request a review of a project to a “Party involved in the proposed CDM activity” and members of the EB. *Id.*, ¶ 6. A review is triggered once a Party involved in the proposed CDM activity or three members of the EB request review. *Id.*, ¶ 10.

The right to request a review of a registration request should be extended to the public. *At a minimum, the right to request review should be provided to UNFCCC accredited NGOs, “stakeholders” as defined in the CDM Modalities and Procedures,⁶ and one or more members*

⁶ The term “stakeholders” is defined as “the public, including individuals, groups or communities affected, or likely to be affected, by the proposed clean development mechanism project activity.”

of the public. Providing the public with the right to request a review will help ensure that CDM projects seeking registration meet all of the applicable requirements, and that all errors, inconsistencies, or omissions in the PDD and supporting documentation are clarified and explained *before* the project is formally registered, thereby avoiding a future appeal. At present, the public only has the right to submit comments during the validation stage.⁷ Often, the comments relate to the lack of supporting documentation to demonstrate that the project meets the registration requirements (e.g., additionality). However, where supporting information or data have been omitted from the validation stage, the public is not provided an opportunity to review or comment on the complete documentation that provides the basis of the EB's decision whether to register the project activity. Essentially, the public is only permitted to comment on what is essentially an incomplete application for registration, rather than allowing input on the completed application.

2. The Time Within Which A Request for Review Can Be Made Should Be Extended from 28 to 42 days, and from 21 to 28 days

As stated above, the current timeline for requesting a review is eight weeks (56 days). CDM Modalities and Procedures, ¶ 41. The Draft Procedures for Review propose to cut this time in half and require requests for review to be made within in 28 days (4 weeks) (and 21 days in the case of small-scale project activities). Draft Procedures for Review, ¶ 8. In the interest of providing adequate time to review requests, while recognizing the need to expedite the process, we recommend that ***this period for requesting review should be extended from 28 days to 42 days, and from 21 days to 28 days.***

3. The Draft Procedures Should Specify that the Request for Review Will be Made Publicly Available on the UNFCCC Website and through Electronic Notification to Interested Parties

The Draft Procedures for Review provide that once a review has been requested, the registration review form should be made “publicly available.” *Id.*, ¶ 10(b). However, the draft procedures do not specify the manner in which the request for review will be made publicly available. We recommend that the Draft Procedures should be revised to specify that ***the requests for review will be made publicly available by immediately posting an anonymous version of the registration review form on the UNFCCC website and by notifying members of the public or NGOs via mailing lists to which they can subscribe.***

Decision 3/CMP.1, Modalities and procedures for a clean development mechanism as defined in Article 12 of the Kyoto Protocol, Annex at ¶ A (1)(e).

⁷ Prior to submitting the a request for registration to the EB, the DOE is required to make the project design documents publicly available, and allow a 30-day comment period wherein the Parties, stakeholders, and UNFCCC accredited NGOs are permitted to submit comments on the validation requirements. CDM Modalities and Procedures, ¶ 40(b) & (c).

4. The Assessment of Responses Process Must be Made More Transparent

The Draft Procedures for Review state that the project participants and DOE shall provide responses to the issues identified in the request for review within two weeks of notification of review. *Id.*, ¶ 10(c). Based on this information, the secretariat is then required to prepare an “assessment of responses.” *Id.*, ¶ 11. The Draft Procedures then provide for what appears to be an informal consultation process between the secretariat and the project participants/DOE. They state that within 5 weeks of notification of the review, the secretariat may request the project participants/DOE to provide “further clarification on their responses or explanation on additional issues arising from the assessment of their responses, through writing and/or telephone communication.” *Id.*, ¶ 12. Pursuant to the next paragraph, “[t]he project participants and the DOE may further communicate with the secretariat following the request for clarification or additional information.” *Id.*, ¶13. According to the Draft Procedures, “[a]ny information relevant to decision making shall be made available in writing.” *Id.*, ¶ 12.

This informal information sharing between the secretariat and the project participants and DOE regarding the request for review is confusing and does not insure that an adequate and complete record of information is compiled and included in the secretariat’s “assessment of responses,” which apparently provides the basis of the decision-making on the request for review. (“The secretariat, on the basis of the responses from *and further communication with* project participants and DOE, shall prepare a final assessment and recommendation for the consideration of the Executive Board, . . .” *Id.*, ¶ 14). This recommendation is also reviewed by a member of the Registration and Issuance Team (“RIT”) as part of the independent technical assessment. Therefore, we suggest ***that all communications between the project participants/DOE and the secretariat following notification of the request for review and related thereto be made in writing, and included in the secretariat’s “final assessment and recommendation.” The secretariat’s assessment and recommendation should then be made available to the public by posting it on the UNFCCC website and by notifying members of the public or NGOs via mailing lists to which they can subscribe.***

Likewise, the Independent Technical Assessment to be prepared by an expert from the RIT should also be made publicly available by posting it on the UNFCCC website and by notifying members of the public or NGOs via mailing lists to which they can subscribe.

5. The Draft Procedures re the EB Decision on the Request for Review Should be Revised to Avoid “Conditional Registration” of Project Activities

According to the Draft Procedures for Review, the EB may rule on the review by applying one of the following outcomes: (a) To register the proposed project activity; (b) To request the DOE and project participants to make corrections based on the findings from the review before proceeding with registration; or (c) To reject the request for registration. *Id.*, ¶ 20.

We recommend that the Draft Procedures be revised to clarify that sub(b) does not mean that the EB may decide to “conditionally register” a proposed project activity where questions still remain regarding eligibility, *i.e.*, where the PDD or other supporting documentation contain errors, omissions or inaccuracies that call into question whether the project meets the registration

requirements as specified in ¶ 37 of the CDM Modalities & Procedures (e.g., additionality, adequate stakeholder consultation). The Procedures already allow ample opportunity for the project participants/DOE to correct, clarify and supplement information that is the basis of the request for registration during the “assessment of review” process. It is during this process that the secretariat reviews the information, requests clarification or elaboration, and then makes a recommendation to the EB whether to accept or reject the project. (The information collected during this process also becomes the basis of the independent technical review by the RIT member.) As described in the Draft Procedures, the assessment of review process is more than a completeness check, and provides the project participants and DOE with ample opportunity (at least 4 weeks) to respond to inaccurate or incomplete information in the PDD and supporting documentation.

On the other hand, where the findings from the review point to technical errors that do not affect whether the proposed project meets the registration requirement (e.g., the proposed number of CERs), the EB should be permitted to register that project as corrected.

As currently drafted, however, paragraph 20(b) suggests that the EB may agree that the PDD or supporting document do not confirm that the project activity meets the registration requirements, but nonetheless register the project once the project participants/DOE has “corrected” the information.

C. Draft Procedures for Request for Issuance of CERs and Request for Review of Issuance

1. The Request for CER Issuance and all Required Documents Should Be Published on the UNFCCC Website and Interested Parties Notified of the Request

Pursuant to the *Draft Procedures for Issuance of CERs* (“Draft Procedures for Issuance”), the DOE is required to submit the documents listed in the latest version of the *Guidelines on Completeness Check of Request for Issuance* (referred to as the “required documents.”)⁸ Draft Procedures for Issuance, ¶ 6. Once the secretariat has determined that the request for issuance is complete in accordance with the Guidelines, “the secretariat will publish the request for issuance on the UNFCCC website.” Draft Procedures for Issuance, ¶ 9. ***We recommend that the procedures be revised to specify (1) that the issuance request be made publicly available by announcing it on the UNFCCC CDM website and in the CDM news facility; (2) that the announcement specify where the issuance request can be found, the name of the proposed CDM project activity and the first and last day of the review period; and (3) that along with the request for CER issuance, the secretariat must publish on the website the accompanying required documents.*** This is important to ensure that the public has access to all the relevant information that purports to support for issuance of the CERs. ***In addition, members of the public or NGOs should be notified of the request for CER issuance via mailing lists to which they can subscribe.***

⁸ The required documents are listed in paragraph 8 of the “Guidelines on Completeness Checks of Requests for Issuance, EB 48 report, annex 68.”

2. *The Public Should be Afforded the Right to Request Review*

The Draft Procedures for Issuance limit the right to request a review of a project to a “Party involved” and members of the EB. *Id.*, ¶ 12. For the reasons set forth above, the right to request a review of a request for issuance of CERs should be extended to the public. ***At a minimum, the right to request review should be provided to UNFCCC accredited NGOs, “stakeholders” as defined in the CDM Modalities and Procedures,⁹ and one or more members of the public.***

3. *The Draft Procedures Should Specify that the Request for Review Will be Made Publicly Available on the UNFCCC Website and through Electronic Notification to Interested Parties*

The *Draft Procedures for Review of Requests for Issuance* (“Draft Procedures for Issuance Review”) provide that once a review has been requested, an anonymous version of the issuance review form should be made “publicly available.” *Id.*, ¶ 10(b). However, the draft procedures do not specify the manner in which the request for review will be made publicly available. We recommend that the Draft Procedures for Issuance Review should be revised to specify that ***the requests for issuance review will be made publicly available by immediately posting an anonymous version of the issuance review form on the UNFCCC website and by notifying members of the public or NGOs via mailing lists to which they can subscribe.***

Respectfully submitted,

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⁹ The term “stakeholders” is defined as “the public, including individuals, groups or communities affected, or likely to be affected, by the proposed clean development mechanism project activity.” Decision 3/CMP.1, Modalities and procedures for a clean development mechanism as defined in Article 12 of the Kyoto Protocol, Annex at ¶ A (1)(e).