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Response for Call for Public Comments on Clean Development Mechanism Validation and Verification Manual

**Submitted by Earthjustice
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Summary:

We welcome the opportunity to provide comments on the CDM Executive Board's draft CDM Validation and Verification Manual (VVM), which provides mandatory guidance for Designated Operational Entities (DOEs) in undertaking their validation and verification work. The VVM provides an important opportunity to clarify and enhance the integrity of CDM implementation.

The specific focus of our comments is the environmental impact assessment (EIA) and public participation components of the draft. Specifically, we believe that the CDM VVM would benefit from the following changes and additions to the EIA and stakeholder consultation provisions:

- First, the EIA provisions contained in paragraphs 49(f) and 151-153 of the VVM should be modified to ensure that negative, and potentially irreversible, environmental and social impacts of CDM projects are adequately assessed and mitigated, and that the public is provided a meaningful opportunity to participate in the EIA process. We recommend that the draft be revised to include internationally-recognized best practices for EIA review that will guide DOEs in ensuring that this important requirement is met, and to build public support for CDM projects.
- Second, the stakeholder participation provisions contained in paragraphs 49(e), 61-67, and 148-150 of the draft should be enhanced to ensure that affected people will be consulted in a meaningful way, and that all relevant stakeholders have the opportunity to review and comment on project design and validation decisions.

Introduction

As mandatory guidance on implementation of the modalities and procedures of the Clean Development Mechanism ("CDM M&P"),¹ the CDM VVM has the potential to clarify and enhance the integrity of CDM implementation. As drafted, however, the VVM lacks the necessary specificity to ensure that significant environmental impacts of proposed CDM activities are adequately assessed and mitigated, and that affected citizens are provided a meaningful opportunity to participate in the EIA process. Without clear requirements that address the environmental and social impacts of CDM projects, it will be difficult to determine

¹ United Nations Framework Convention on Climate Change [UNFCCC] Decision 3/CMP.1, Modalities and procedures for a clean development mechanism as defined in Article 12 of the Kyoto Protocol, ANNEX, at 6, *available at* <http://unfccc.int/resource/docs/2005/cmp1/eng/08a01.pdf>

the extent to which the CDM is meeting its sustainable development goal. In addition, the draft does not provide sufficient detail regarding the required stakeholder consultation processes to ensure that CDM projects are implemented in a participatory manner that incorporates civil society input. To address these concerns, we urge the CDM EB to revise the draft text as set forth below.

I. Environmental and Social Impact Assessment Standards Should be Added to Ensure Impacts are Properly Characterized and Mitigated, and to Allow Meaningful Public Participation in the EIA Process

Environmental and social impact assessments have become international best practice for implementation of development projects that may have a significant impact on the environment. Principle 17 of the Rio Declaration provides: “[e]nvironmental impact assessment, as a national instrument, shall be undertaken for proposed activities that are likely to have a significant adverse impact on the environment and are subject to a decision of a competent national authority.”² Such assessments help decisions-makers ensure that they have considered all the environmental and social costs and benefits of a project, that affected populations are identified and consulted, and that the most sustainable and least damaging project design is selected.³

One of the essential components of an effective EIA process is meaningful public participation in all stages of decision-making. Principle 10 of the Declaration of the United Nations Conference on Environment and Development (UNCED) in Rio de Janeiro (Brazil, 1992)⁴ emphasizes that environmental issues are best handled with the participation of concerned citizens. Agenda 21, adopted by UNCED, further recognizes the important role of public participation in EIA in achieving sustainable development.⁵ The principles promoted by these conferences have been fully integrated into the provisions of the 1991 Convention on Environmental Impact Assessment in a Transboundary Context (“Espoo Convention”), which requires adoption of EIA procedures that provide for full and meaningful public participation.⁶

² U.N. Conference on Environment and Development, June 3-14, 1992, *Rio Declaration on Environment and Development*, princ. 17, U.N. Doc A/CONF.151/5/Rev.1 (June 14, 1992) [hereinafter *Rio Declaration*].

³ See generally, Sadler et al. United Nations Environment Program [UNEP], *Environmental Impact Assessment Training Resource Manual (2002)*, available at <http://www.unep.ch/etb/publications/EIaman/IntroManual.pdf>.

⁴ Rio Declaration, *supra* note 2, princ 10.

⁵ See U.N. Conference on Environment and Development, June 2-14, 1992. *Agenda 21* par. 23.2. U.N. Doc A/CONF.151/26 (Vol. III) (June 14, 1992). The Agenda states that “[o]ne of the fundamental prerequisites for the achievement of sustainable development is broad public participation in decision-making. Furthermore, in the more specific context of environment and development, the need for new forms of participation has emerged. This includes the need of individuals, groups and organizations to participate in environmental impact assessment procedures and to know about and participate in decisions, particularly those which potentially affect the communities in which they live and work. Individuals, groups and organizations should have access to information relevant to environment and development held by national authorities, including information on products and activities that have or are likely to have a significant impact on the environment, and information on environmental protection measures.”

⁶ The Espoo Convention applies not only to transboundary impacts between neighboring countries but also to long-range transboundary impacts including activities with linkages to climate change. ECE

Recognizing the important benefits of EIA review, the Parties to the Kyoto Protocol have made such analysis a requirement for CDM project validation. CDM M&P, ¶ 37(b) & (c). The CDM VVM provides that the DOE must ensure that an “analysis of environmental impacts has been undertaken and if those impacts are considered significant by the host Party or the PPs, that an environmental impact assessment has been undertaken in accordance with procedures as required by the host Party.” VVM, ¶ 49(f).

However, the VVM’s lack of any guidance on or minimum standards governing EIA review creates a significant risk that the goals of the EIA process will be undermined in the CDM validation process. It is well documented that EIA laws in many developing countries are ineffective for a variety of reasons, including their limited scope, inadequate implementation, lack of enforcement,⁷ lack of safeguards to ensure that the project is undertaken in the most environmentally sustainable way, and/or failure to afford impacted citizens a meaningful opportunity to participate in the decision-making process.⁸ In addition, in some developing countries, the host Party has a financial stake in the proposed CDM project (*e.g.*, through imposition of taxes on revenues from CDM approved projects), thereby creating an actual or perceived bias in the project validation process.⁹ Moreover, authority to determine whether the project will have a significant environmental impact should not be left to the PPs themselves given their clear financial stake in seeing that the project gets approved for CDM credits.

Finally, it is likely that numerous non-Annex I countries do not have EIA laws, thereby creating the unacceptable situation wherein CDM projects having significant environmental or social impacts, but for which no EIA is required under domestic law, are validated, constructed, and ultimately certified for issuance of CDM credits.¹⁰ In light of the formidable obstacles to EIA review in many developing countries in which CDM projects will be undertaken, we recommend the VVM be revised to include international best practices for the EIA process and to provide DOEs some measure of guidance in ensuring that a meaningful EIA of the proposed CDM activity has been undertaken.

Guidance on the Practical Application of the Espoo Convention, § 2.4, ¶ 26, available at <http://www.unece.org/env/documents/2006/eia/ece.mp.eia.8.pdf>.

⁷ William L. Andreen, *Environmental Law and International Assistance: the challenge of strengthening Environmental Law in the Developing World*. 25 Colum. J. Envtl. L. 17, 29 (2000).

⁸ Barry Sadler et al., UNEP Environmental Impact Assessment Training Resource Manual, Topic 2, 146 (2002) http://www.unep.ch/etu/publications/EIA_2ed/EIA_E_top2_body.pdf.

⁹ Michael Wara & David Victor, *A Realistic Policy on International Carbon Offsets*. Working Paper #74. Freeman Spogli Institute for International Studies, 14 (April 2008). iis-db.stanford.edu/pubs/22157/WP74_final_final.pdf. See also Patrick McCully and Tom Athanasiou. *Bad Deal for the Planet: Why Carbon Offsets aren’t Working...And How to Create a Fair Global Climate Action Accord*. Dams Rivers and People Report, 11 (2008), available at <http://www.internationalrivers.org/node/2826>.

¹⁰ As of 2002, about 100 countries have EIA laws, leaving approximately 90 without legal EIA requirements. Barry Sadler et al., UNEP Environmental Impact Assessment Training Resource Manual, Topic 1, 108 (2002), available at http://www.unep.ch/etu/publications/EIA_2ed/EIA_E_top1_body.pdf.

A. The CDM VVM Should be Revised to Include Technical Standards for Environmental Impact Assessments and Management Plans

As indicated above, and despite international best practice, the draft VVM provides no guidance by which social and environmental outcomes of projects should be assessed, minimized and mitigated. Rather, the VVM calls upon DOEs to “assess, on the basis of a review of the relevant legislation and local expertise, whether a[n] Environmental Impact Assessment is required for the project activity.” VVM, ¶ 152. Given the dearth of environmental regulation in many non-Annex I countries, as well as the poor environmental enforcement regimes, the VVM fails to address the significant risk that proper environmental assessment and mitigation will not be undertaken for many CDM projects. In fact, failure to adequately address concerns about adverse environmental impacts and human rights abuses has been documented for at least two projects currently in the validation stage.¹¹

We therefore propose that the guidance on validation of the EIA requirement in paragraphs 49(f), and 151-153 of the VVM be revised to include the following minimal standards and guidance for ensuring effective EIA review:

- The term “impact” should be broadly defined (such as that contained in the Espoo Convention) to include, *inter alia*, any effect caused by the proposed CDM project activities on the environment including human health and safety, flora, fauna, soil, air, water, climate, landscape, and historical monuments or other physical structures or the interaction among these factors; it also includes effects on cultural heritage and integrity or socio-economic conditions resulting from alterations to those factors.
- Situations in which environmental and/or social impacts are presumed to be significant and therefore require an EIA review should be included, *e.g.*, the World Bank standards for Category A projects, which provide:

*A proposed project is classified as Category A [and thus requires an EIA] if it is likely to have significant adverse environmental impacts that are sensitive, diverse, or unprecedented. These impacts may affect an area broader than the sites or facilities subject to physical works. EIA for a Category A project examines the project’s potential negative and positive environmental impacts, compares them with those of feasible alternatives (including the “without project” situation), and recommends any measures needed to prevent, minimize, mitigate, or compensate for adverse impacts and improve environmental performance.*¹²

¹¹ See *e.g.* Barbara Haya *Failed Mechanism: How the CDM is subsidizing hydro developers and harming the Kyoto Protocol*, 7 – 8 (Nov. 2007) (documenting adverse environmental impacts and human rights and public participation concerns of the Sondu Miriu Hydro Power Project and Campos Novos Dam) available at http://www.internationalrivers.org/files/Failed_Mechanism_3.pdf.

¹² World Bank. Operational Policy 4.01 on Environmental Assessment, par. 8(a), available at <http://wbln0018.worldbank.org/Institutional/Manuals/OpManual.nsf/whatnewvirt/9367A2A9D9DAEED38525672C007D0972?OpenDocument>.

In addition, the VVM should include a list of CDM project types that are presumed to require an EIA, *e.g.*, hydropower projects with a generation capacity exceeding 20 megawatts, etc.

- Other minimum EIA requirements. The United National Environment Program (UNEP) and other international institutions have recognized several essential elements for adequate EIA. These include explicit consideration of environmental factors at an early stage in the decision-making process (*e.g.*, scoping); assessment of environmental and social impacts of projects and possible alternatives; selection of the least harmful project design; and, where significant adverse impacts are likely to occur that cannot be avoided, adoption of mitigation measures.¹³

B. The CDM VVM Should Be Revised to Ensure Meaningful Public Participation in the EIA Process

An additional shortcoming in the draft VVM is its failure to ensure that the EIA analysis includes an opportunity for meaningful public participation. Public participation is considered a “cornerstone of the EIA process”¹⁴ that is crucial to identifying issues and information relevant to a development project’s potential environmental and social impacts.¹⁵ Indeed, local knowledge also may be of considerable benefit to the development and viability of a project and its contribution to sustainable development.¹⁶ According to UNEP EIA Training Manual, “[m]any projects have failed because they did not take into account local or traditional factors or because they failed to gain public acceptance and support.”¹⁷

We therefore propose that the CDM EB further revise paragraphs 49(f) and 151-153 to specifically include minimum provisions for public participation in the EIA review. For example, the VVM should require that:

- The public is appropriately notified of any CDM project activities with potential adverse environmental impacts as early on in the process as possible;
- The public, in areas likely to be affected by the CDM project activities, is permitted to express concerns and opinions regarding the proposed activities early on in the process when all options remain open and prior to the final decision on the CDM proposed activities;
- All notifications and project information provided to the public are available in the local languages and made available to the public using the most appropriate and accessible means;

¹³ Sadler et al., *supra* note 10.

¹⁴ *Id.* at 113.

¹⁵ Sadler et al., *supra* note 8 at 146.

¹⁶ *Id.*

¹⁷ *Id.*

- For projects that will significantly impact local populations, a requirement that the EIA documentation, as well as a non-technical summary of project impacts, be published in the local language;
- Reasonable time-frames for consultation and review are provided that allow sufficient time for the public to participate in each of the different stages of the EIA process;
- In making the final decision on the proposed activity, all public concerns are responded to in an understandable and thorough manner, and due account is taken of the results of public input in the EIA procedure;
- Publication and consultation on environmental and social management plans that set forth in detail the specific measures, timelines, and resource allotments that will be implemented to ensure negative project impacts are appropriately mitigated; and
- Publication of periodic monitoring reports that inform local stakeholders of the progress of the management plan implementation, any unforeseen impacts that the project may be causing, and update management plans, if needed.

We also recommend that the CDM VVM provide the PP with recommended guidance for ensuring effective public participation, as discussed further in Section II.

II. The Stakeholder Participation Provisions Should be Clarified and Enhanced to Ensure That Participation is Meaningful, Measurable, and Proportionate to Project Impacts.

The clear benefits of public participation in environmental decision-making is well recognized under international law. As set forth in the 1998 UNECE Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters (“Aarhus Convention”):

[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 in accordance with the provisions of this Convention.¹⁸

¹⁸ 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>.

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 generally,¹⁹ and water resource management, agriculture, forest management, and mining in particular.²⁰

In recognition of the right of affected communities to be consulted, and of the value of civil society input in general, the CDM M&P require the PP to invite local stakeholders to submit comments on the proposed CDM activities, and to provide a summary of those comments to the DOE along with a description of how such comments were taken into account. CDM M&P, ¶ 37. In the context of CDM project validation and verification, this requirement is separate from, but overlapping with, the need to allow public participation in the EIA process. Local stakeholder participation, even in instances where the environmental impact is unlikely to be major and/or irreversible, not only promotes transparency and accountability but also confers legitimacy in CDM project validation and verification. External (or non-local) stakeholder review can also ensure that projects are meeting their purported goals.

A. The Draft Should Be Revised to Include Standards for Local Stakeholder Participation

As currently drafted, paragraphs 49(e) and 148-150 of the VVM lack sufficiently clear guidance on how affected local stakeholders can participate in the validation and verification process. Also unclear is the extent to which PPs must enable and solicit local stakeholder participation at various stages of project implementation. Without such guidance, opportunities for local

¹⁹ 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.”

²⁰ *See* WSSD Plan of Implementation par. 25 (b) (“[States recognize the need to] [f]acilitate access to public information and participation, including by women, at all levels in support of policy and decision-making related to water resources management and project implementation”). *See also* pars 40 (f), 45(h), 46(b) (explaining the participation requirements for agriculture, forestry, and mining projects, respectively); *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.”

stakeholders to review, comment on, and provide input into the design and implementation of CDM projects are limited at best.

Specifically, we note several shortcomings in the VVM's local stakeholder provisions including:

1. **No guidance on the standard for ensuring the PP undertakes “adequate” consultation with local stakeholders and responds sufficiently to local concerns.** Paragraphs 49(e) and 148-150 of the VVM provide no elaboration or guidance on how the local stakeholder consultation process is to be undertaken – *i.e.*, the location, scope, contents, frequency, and timeline of public consultation meetings. The lack of such specificity creates a significant risk that CDM projects that undergo only cursory or superficial local stakeholder input will be validated by the DOEs. Indeed, in at least two documented instances, documentation of stakeholder consultations were copied and pasted from one PDD to another.²¹
2. **Lack of a clear timeline for local stakeholder consultation.** Paragraphs 149-150 do not set forth a required timeline for consultation with local stakeholders. The VVM does not ensure that such consultation occurs early on in the process. Moreover, it is unclear if the 30-day time period for submission of comments set forth in paragraph 61, which applies to non-local stakeholders, also applies to local stakeholders. As elaborated below, the 30 day requirement is insufficient to ensure adequate public review, especially given the highly technical nature of CDM projects and the low literacy rates in some project regions.
3. **No guidance on how local stakeholders are to be informed regarding the stakeholder consultation or to whom and in what manner local stakeholder comments should be submitted.** The CDM VVM only requires that the PDD be published in English. Because many affected groups in non-Annex II countries neither speak English nor have access to the internet or even postal services, without such guidance, the commenting process may remain out of reach to important stakeholders.
4. **Weak guidance on how transparency, openness and meaningful participation can be ensured given the highly technical nature of the documents.** Such a requirement will make submissions impossible for many local groups. Moreover, paragraph 31 holds that “information shall be recorded, compiled and analyzed in a way that will enable...**external intended users** to attest to its credibility” but fails to explain who such “intended” users are.
5. **Insufficient matching of consultation requirements with the scale and scope of the project impact.** There are no requirements that directly impacted groups be consulted in more depth and with more frequency than other groups. This lack of distinction may lead to a reduction of consultation to one, lowest common denominator that does not meet the spirit or letter of internationally recognized rights of directly affected people to be consulted about projects that directly affect them.

²¹ Center for Science and Environment. *Making the cheap development mechanism clean: How?* (2005). <http://www.cseindia.org/programme/geg/pdf/CDM-presentation.pdf>.

6. **Lack of a recourse mechanism for stakeholders who feel they have not been adequately consulted.** Because of the inherent risk that project implementers may not meet the requirements set forth above, a recourse mechanism will be important to ensure accountability and, ultimately, the integrity of the validation standards and processes.

We therefore request the CDM EB consider further revising paragraphs 49(e) and 148-150 to define and detail the requirements for “adequate public consultation.” For example, we recommend that:

- Clear time, place, scope, content, and frequency criteria for local stakeholder consultations are established that ensure that consultations are accessible to all stakeholders and that consultations adequately inform concerned groups of project details and possible impacts, and allow them to express their concerns, share information, and have their questions answered.
- Establishment of a time period for review of the PDD to at least 60 days for all projects.
- All communications with local stakeholders be in the local language and via appropriate and effective means (*e.g.*, radio, TV, posters near the project area) in order to eliminate any significant logistical and communication barriers.
- Prompt and accessible public notification is given that reaches all stakeholders and includes a description of the project’s EIA analysis, including the project’s projected scope, lifetime, adverse impacts, and management plans.
- The PP publishes a non-technical summary of the project in the local language and via media that is accessible to all stakeholders prior to the consultation.
- Consultation with stakeholders is conducted in proportion to the level of project impact that is likely to result from a particular CDM project.
- Thorough, understandable, and timely responses to stakeholder comments are published and conveyed to the concerned parties. When comments are submitted in a local language, responses should be provided in the same language.
- A recourse mechanism is included for stakeholders who feel they have not been adequately consulted.

B. Non-Local Participation Standards Should Also Be Included

Paragraphs 61 – 67 of the VVM suggest that a separate process for non-local stakeholders and NGOs is required. Once again, we believe the VVM would benefit if the following issues were addressed:

1. **No guidance on the required standards for consultation with non-local stakeholders.** Paragraph 61 fails to specify the manner in which consultations and responses to non-local

stakeholder concerns should be undertaken. While paragraph 67 emphasizes that “the DOE is *not* required to enter into a dialogue with the Parties, stakeholders or NGOs commenting on the validation requirements...,” it does not specify what, at a minimum, *is* affirmatively required. As with the local stakeholder standards, absent such specificity, the DOE runs the risk of approving CDM projects that have had only cursory or superficial stakeholder input.

2. **A highly constrained 30-day time period for comment on the PDD by non-local stakeholders.** The 30-day period is too short to ensure meaningful public participation. Given the highly technical nature of the PDD and the diverse stakeholders that may wish to review and comment on the document, a time period of 30 days is insufficient. That major afforestation/reforestation (A/R) projects have a 45-day timeline is an implicit acknowledgment that complex and high-impact projects require longer time periods for sufficient review; given that other major non-A/R projects can have equally complex impacts, such an extension is also warranted.

We therefore propose that the CDM EB consider making the following changes to the VVM:

- Extension of the time period for review of the PDD to 60 days for all projects.
- Clarification of how and to whom comments can be submitted and allowance of submissions through locally feasible means and in local languages.
- Establishment of a recourse mechanism to which stakeholders can submit concerns related to possible project impacts and lack of adequate opportunity for public participation.

Once again, we appreciate this opportunity to provide comments on the CDM VVM, and hope our recommendations will prove useful in promoting transparency, accountability, and integrity in the CDM validation and verification process.

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