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From leo.perkowski@pd-forum.net
Date 23 April 2010
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Subject **Call for public inputs: Procedures for appeals in accordance with the CMP requests in paragraphs 42-43 of Decision 2/CMP.5**

Dear Mr. Mahlung,

Honourable Members of the CDM Executive Board,

The members of the Project Developer Forum would like to thank the CDM Executive Board for the opportunity to respond to this Call for Public Inputs. We strongly welcome this opportunity, as the creation of appeal processes has been one of the long-time recommendations of the stakeholder community and is a tool commonly used successfully in other regulatory processes. We firmly feel the right to appeal DOE/EB decisions must become an integral part of the proposed review of registration and issuance procedures.

Please note that along with this document, many of our members have provided additional inputs to the Call via organizations such as IETA and CMIA. The PD Forum offers its support to the submissions of both organizations.

We observed however, the comments in those inputs to be focussed on specific issues and do not fully address paragraph 42(a) appeals of decisions and recommendations of a Designated Operational Entity (DOE) and the CDM EB request to includes views on how the procedures for appeals interrelate to revised procedures for registration, issuance and review currently under the Board's consideration in accordance with paragraph 37 of Decision 2/CMP.5 (See Figure 1). To that end we provide the following input:

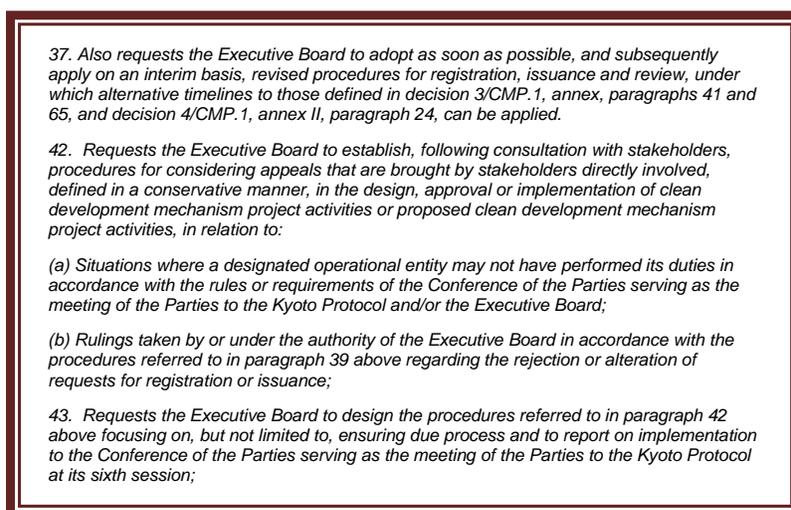


Figure 1, Excerpt from decision 2/CMP5

In reference to paragraph 42(a), the PD Forum proposes the establishment of a DOE Appeal Board under the auspices of the Accreditation Panel, separate and distinct from an EB Appeals Board, on the basis that the level of detail and significance of DOE appeals is significantly different from EB appeals.

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We propose below an approach that maintains the spirit of the CMP decision and ensures that the addition of a DOE appeals process will improve efficiency and environmental integrity without hindering the functioning of the CDM.

One issue needs to be clearly stated. PD Forum members understand that establishing a DOE appeal process is an undertaking that requires substantial experience and expertise; it will be a fundamental element of the CDM and its governance structure. Its design and implementation cannot and will not be taken lightly. PD Forum members have significant experience and expertise in the validation and verification procedures and many have worked with multiple DOEs and IEs. We see many benefits of having an independent and publicly available record of appeals against DOE recommendations; not least the opportunity for DOEs to learn from other DOEs and thereby enhance the consistency of DOE decision making processes. We look forward to an ongoing dialogue with the Executive Board as it continues to take steps towards the establishment of this appeal process.

As a first step in setting up an appeals process, we would like to propose a set of guiding principles, some of which were discussed when the CMP decision was drafted and were captured in the decision itself. These principles should be part of the appeals process and adhered to at every point in the process.

- **Conservative range of interveners.** The appeals process should not provide an opportunity for frivolous interventions and create gridlock for the CDM. Consequently, those that appeal should have “direct interest” in the project activity, such as those that are affected by rejection or alteration of request for issuance or registration. Para 42 of the CMP decision clearly states that it should be available to stakeholders “directly involved, defined in a conservative manner”. It is clear that the CMP wanted to ensure that range of interveners would be narrowly defined. In that regard, we propose that only PPs, host and participating DNAs, and persons interviewed and listed in the PDD be allowed to request an appeal of a DOE recommendation.
- **Broad scope for appeal.** The topics on which one could appeal should be broad, as described in paragraphs 42, (a) and (b). This submission focuses on paragraph 42 a. They should be able to address any recommendation made by DOEs, even if decisions by DOEs can be overruled by the EB anyway. In other words, the appeal process should not be limited to seeking recourse to a negative or positive validation/verification recommendation, but should also allow appeal of other aspects of the validation/verification which influence estimations such as emission factors, conservative assumptions, interpretation of methodologies and guidance etc.
- **Independence of the appeal body.**
 - A body with responsibility for the decision being appealed should not be involved in the appeal process, nor have any power over those that sit in judgment of the appeal.
 - Those whose decision is under appeal (i.e. DOE) cannot be in a position to dismiss or appoint individuals that undertake the appeal, or influence them in any material manner.
 - Those hearing an appeal cannot, at some point, have had final say in the decision, even if the decision making process is set up in such a way that they only have to “rubber stamp the decision”.
 - It follows and it is self evident, that as a result, the Appeal Panel cannot be comprised of members of the DOE whom is being appealed.
- **That the panel has expertise in appeals procedures.** The panel need not be a technical body, but it should have access to technical advisors whom its members may choose to call in. DOEs, AIEs, Accreditation or Methodological Panel members, other accreditation experts and various stakeholders may also have experience in, or knowledge of validation and verification procedures.
- **Barriers to appeals.** The cost to carry out the appeal should not be a barrier to executing an appeal.

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- **Timeliness.** Any appeal should not cause undue delay to the CDM project and should observe predetermined timelines.
- **Transparency.** Any appeal process should be announced and reported in public, on the record, with full disclosure whilst respecting the normal CDM rules on confidentiality.

Proposal

Taking into account the principles outlined above, the PD Forum proposes the following outline for a DOE Appeals Process:

Composition & Appointment

- An appeal body, the Appeals Board (AB), comprised of 12 members shall be created and appointed by the Accreditation Panel for a set period, perhaps three (3) or four (4) years.
- AB members cannot be re-appointed, but can be dismissed by the Accreditation Panel under certain circumstances following strict rules
- The AB is not a full-time appointment.
- There will be clear Terms of Reference (ToRs) for selection of AB members.
 - The ToRs should emphasize the requisite policy, regulatory and appellate background, standing in the community, independence, and freedom from conflicts of interest.
 - AB members act in a personal capacity.
 - It should specifically state that membership is not limited to government employees, but rather it is open to individuals from the private sector, academia and civil society who possess the requisite qualifications.
 - The ToRs should ensure that there is no overlap with current or past membership in the EB.
 - It should also ensure that the AB is not a technical panel akin to, or one that duplicates or overlaps with, the competencies of the Methodologies Panel or the Registration and Issuance Team (RIT).
 - Individuals that have actual or potential conflicts of interest will be recused from serving on the Panel of a particular appeal.
- 50% of membership in the AB should turn over every two (2) years.
- Candidates for the AB can be submitted by any interested person or organization.
- Appointments to the DOE AB will be made by the Accreditation Panel on the basis of assessment of applications against a list of defined criteria.

Type of decisions that the AB can make

- The AB can hear an appeal and send it back to the DOE with a decision requesting the DOE review the AB recommendation according to assigned criteria, for example:
 - The DOE had made an error in the consideration of certain parts of the material submitted,
 - The DOE had not considered some of the evidence before it, has asked for the wrong type of information, has made an error in the process in general,
 - The DOE has made unjustified decisions or assumptions in the interpretation of guidance or methodologies,
 - The DOE has acted inconsistently or has not fielded an adequately qualified assessment team etc.
- The AB does not have the authority to substitute its decision for the recommendation of the DOE.

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Elements of the life cycle of an Appeal

- PPs holding a contract with a DOE may decide whether to appeal DOE decisions via the DOE's internal appeals process and / or via the Accreditation Panel's DOE Appeals process.
- In order to lodge an appeal, an appellant must submit a written Appeal within 60 calendar days of a relevant recommendation.
- A written Appeal must provide specific allegations of misinterpretations of fact, procedural mistakes or errors in judgment. Allegations must be supported with evidence.
- The AB should assign cases to an Appeals Panel (AP) of three (3) members of the AB, chosen at random among its members. Any member that has a conflict of interest will be disqualified and replaced.
- On the basis of the Appeal document, the AP shall decide whether to hear the case or not.
- The AB will make the Appeal public, as well as all documentation submitted, and invite, at its discretion, submissions by other entities that it considers relevant to the Appeal. These will be restricted to PPs, host and non-host DNAs, persons interviewed and listed in the PDD and entities that submitted relevant comments during the GSP.
- If the AP believes that the Appeal contains insufficient claims to substantiate a prima facie case of such misinterpretation, mistake or error, the AP can make a Preliminary Determination that rejects the claim pending additional clarifications, which the Appellant must provide in writing within 15 calendar days.
- The Appellant shall be given one opportunity to remedy any deficiencies in the documentation before the AP enters a Final Decision.
- All those that lodge an appeal have the right to be heard by an AP, provided it has demonstrated a prima facie claim in its Appeal.
- An appellant, as well as all those that are invited to make submissions, can be heard in-person, via electronic means or via written submissions.
- The AB shall be supported by an Appeals Unit of the Accreditation Panel.
- An Appeal shall be decided within 30 calendar days.

Who has standing in an Appeal?

- Appeals can only be lodged/initiated by those "directly involved, defined in a conservative manner" (CMP para 42) (ie PPs, host and non-host DNAs).
- The AB will invite entities and individuals restricted to PPs, host and non-host DNAs, persons interviewed and listed in the PDD and entities that submitted relevant comments during the GSP, at its own discretion, to make submissions

What can be appealed?

- All recommendations of DOEs or provisionally designated Operational Entities concerning the validation or verification of CDM project activities.

Transparency

- The AP's decisions will be issued in writing and made publically available. This includes both preliminary decisions and final decisions.
- All evidence in an appeal will be on the record and available to the public via internet
- The debates of the AB and AP will not be open to the public.

Costs & Compensation

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- It will be decision of the AB whether the costs of the appeal will be borne by the appellant or the DOE or divided between them.
- Either way, costs to the appellant will be capped at ten (10) days at an advertised daily rate
- The AB cannot impose or award any compensation

In reference to CDM EB request to include views on how the procedures for appeals interrelate to revised procedures for registration, issuance and review currently under the Board's consideration, the PD Forum used as a baseline the proposed documents identified in recent the Call for Inputs: Review of the registration and issuance process. We have identified where in the process, we feel the right to an appeal would be appropriate and provided limited text on how such a process might be administratively managed.

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

Immediately following paragraph 5, the project participant and other stakeholder's shall have the opportunity to appeal DOE decisions related to the determination that the proposed project activity is valid and meets the requirements prescribed in the VVM and other CDM requirements. Should the project participant and/or other stakeholders wish to appeal the DOE validation decision or any unresolved issue related to the PDD, they shall notifying the secretariat of their intent to appeal the decision within 60 working days of the DOE's final determination, or the DOE's absence of activity to render a decision surpassing three (3) months.

2. Draft Procedure for Review for requests for registration

Section F, Immediately following paragraph 22: If a final ruling rejects the request for registration, the project participant and/or other stakeholders may appeal the EB decision to reject project registration by notifying the secretariat of their intent to appeal the decision within 60 working days of the final consideration by the Executive Board.

3. Draft Procedures for Requests for Issuance of Certified Emission Reductions

Immediately following paragraph 5, the project participant and other stakeholder's shall have the opportunity to appeal DOE decisions related to the verification that the quantity of CERs claimed in the monitoring report is valid and meets the requirements prescribed in the VVM and other CDM requirements. Should the project participant and/or other stakeholders wish to appeal the DOE verification decision or any unresolved issue related to the Monitoring Plan and supporting documents, they shall notifying the secretariat of their intent to appeal the decision within 60 working days of the DOE's final determination, or the DOE's absence of activity to render a decision surpassing two (2) months.

Immediately following paragraph 14, the stakeholders listed in the MOC shall have the opportunity to appeal issuances and distributions of CERs that are not carried out by the CDM registry administrator in accordance with instructions from the project focal point. Note: Admittedly, this may be better handled via an administrative action instead of an appeal. Only if the administrative action fails to resolve the issue should an appeal be considered.

4. Draft Procedure for Review for Requests for Issuance

Section F, Immediately following paragraph 22: If a final ruling rejects the request for issuance, the project participant and/or other stakeholders may appeal the EB decision to reject the issuance by notifying the secretariat of their intent to appeal the decision within 60 working days of the final consideration by the Executive Board.

In all of the above situations, the proposed concepts listed in the first part of the document would be applied to the appeal action and process.

Again, thank you for the opportunity to comment on the proposed appeals process. We are available to

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provide further comments or clarifications at any time during your deliberations. Please feel free to contact us at any time.

Kind regards,

A handwritten signature in blue ink, appearing to read "Leo S. Perkowski".

Leo S. Perkowski
Co-vice Chairman, Project Developer Forum