



CDM INVESTMENT NEWSLETTER

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South African CDM Update, by Andrew Gilder and Melissa Basterfield, IMBEWU Enviro-Legal Specialists (Pty) Ltd.

IMBEWU CONTRIBUTED TWO ARTICLES TO ISSUE 1/2005 OF THIS NEWSLETTER on the CDM in South Africa covering interaction of the CDM rules with domestic requirement for environmental impact assessment (EIA), and the (then) recently unveiled Designated National Authority (DNA). While Africa, as a whole, is still considered to be something of a CDM-void and while the number of projects in the South African pipeline is nothing like that of India, China or Brazil, CDM business in this country is currently shaking off its lethargy and taking a continental lead. The time is ripe, then, for an update on the South African CDM situation.

PART A: ENVIRONMENTAL IMPACT ASSESSMENT¹ In our previous article we noted that *“EIA can be expensive with costs arising inter alia from consultant’s fees or potentially extended timeframes required for granting of the EIA authorization or dealing with appeals against and review of the authorization”*. This notion was recently underscored when the highest authority in the land recognized that delays in processing EIA applications were imposing constraints on national development. President Thabo Mbeki is quoted as saying that the number of unprocessed EIA applications had reached a level that was *“quite frightening”*, while also noting that EIA is fundamental to the protection of South Africa’s environmental integrity in the face of the need for sustainable development. The national Department of Environmental Affairs and Tourism (DEAT) subsequently announced a five-point action plan to improve the efficiency and effectiveness of the EIA process. These interventions by government should be taken as positive attempts to ensure that development is not unnecessarily hindered. This is especially important in light of South Africa’s hosting of the 2010 FIFA Football World Cup, an event that will require significant infrastructural development over the next four years.

Government action to resolve EIA procedural issues has involved an amendment and re-alignment of the domestic EIA legal regime. EIA has been a statutory requirement in South Africa since 1997 when the relevant legal regime was located in the Environment Conservation Act No. 73 of 1989. This regime, as amended, held sway until July of 2006 when the legislative basis for EIA became focused on the National Environmental Management Act No. 107 of 1998 (NEMA). While the NEMA requirement for EIA has been part of South African legislation since the Act’s commencement in January 1999 – thus providing for an EIA regime that operated in parallel to that of the Environment Conservation Act – the NEMA approach tended to be less favoured by developers and decision-makers alike. This situation has now altered as a result of certain amendments to NEMA, the promulgation of new EIA Regulations in terms of NEMA and the repeal of relevant portions of the Environment Conservation Act and related Regulations. Consequently NEMA is now the sole legislative base for EIA in South Africa.²

THE CONTEXT FOR A DISCUSSION ON EIA AND THE CDM includes the fact that the modalities and procedures for the latter do not specifically require that EIA be undertaken prior to the implementation of a project. Rather, they state that if the environmental impacts of the proposed CDM project activity are considered significant by the project participants or the host Party, then an *“environmental impact assessment [must be undertaken] in accordance with the procedures as required by the host Party”*.³ Thus the international CDM regime acknowledges the primacy of the host country’s domestic EIA regime, and it is for this reason that awareness of the intricacies and idiosyncrasies of such regime, and its relevance to CDM project development, is essential for the CDM investor. This is particularly the case in South Africa where the undertaking of EIA is fairly complicated and includes severe penalties for non-compliance. In addition the DNA requires that applications for host country approval, in instances where the project activity triggers the domestic EIA requirement, include a written, positive Record of Decision (RoD) containing the environmental authorization. In other words: if your South African CDM project triggers the domestic EIA requirement and no positive RoD is forthcoming, there will be no DNA approval, and no CDM registration.

THE FOUNDATION FOR EIA IN SOUTH AFRICA is a set of so-called 'listed' activities the undertaking of which triggers the requirement to conduct an EIA. This approach characterized the EIA regime promulgated under the Environment Conservation Act. The amended NEMA regime also depends on *"the potential impact on the environment of listed activities [being] considered, investigated, assessed and reported on to the competent authority charged ...with granting the relevant environmental authorization [to undertake the activity]"*.⁴ In essence, national or provincial government is empowered to identify activities which may not commence without environmental authorization from the competent authority.⁵ The same tiers of government are further empowered to make regulations prescribing *inter alia* the procedure to be followed in applying for an environmental authorization and the preparation and evaluation of environment impact reports⁶.

Certain innovations have been introduced by the new NEMA EIA Regulations. For example, the listed activities identified in terms of the Environment Conservation Act did not distinguish between EIAs of varying stringency. Rather the application of a more or less stringent level of EIA was left to the discretion of the competent authority. It goes without saying that cost and time savings were achievable if an applicant were able to achieve a less stringent level of EIA. By contrast, the new EIA Regulations draw a distinction between levels of assessment required for particular activities. Activities with a lesser environmental impact require a so-called 'basic assessment', while activities expected to have a more significant impact trigger a 'scoping' requirement, which implies a more elaborate process. In addition, the Environment Conservation Act did not prescribe timeframes delimiting the assessment and appeal phases (a situation that resulted in numerous delays in the decision-making process) and only rarely prescribed operational thresholds for activities. The NEMA EIA Regulations impose strict timeframes within which elements of the process must be completed and introduces certain thresholds below which the EIA requirement may not be triggered.⁷

IN OUR EARLIER ARTICLE we assessed the applicability of the (then) prevailing EIA regime to a proposed landfill gas to power generation CDM project activity. Table 1 is an assessment of the applicability of the NEMA EIA Regulations to landfill gas capture and use activities. Note that a proposed activity need comprise only one listed activity to trigger the EIA requirement.

<i>TABLE 1: CASE STUDY</i>	
<i>Application of the 'listed activities' in the NEMA EIA Regulations to a proposed landfill gas to power generation CDM project</i>	
<i>ACTIVITIES REQUIRING BASIC ASSESSMENT¹</i>	<i>ACTIVITIES REQUIRING SCOPING¹</i>
<i>Schedule item 1(l): "The transmission and distribution of above ground electricity with a capacity of more than 33 kilovolts, but less than 120 kilovolts."</i>	<i>Schedule item 1 (f): "The recycling, re-use, handling, temporary storage or treatment of general waste with a throughput capacity of 50 tonnes or more daily measured over a period of 30 days."</i>
<i>Schedule item 16(f): "The transformation of undeveloped, vacant or derelict land to recycle, handle, store temporarily or treat hazardous waste."</i>	<i>Schedule item 1 (g): "The use, recycling, handling, treatment, storage or final disposal of hazardous waste".</i>
<i>Schedule item 23: "The decommissioning of existing facilities or infrastructure, other than facilities or infrastructure that commenced under an environmental authorisation issued in terms of EIA Regulations 2006 for- (a) electricity generation...; (d) the disposal of waste."</i>	<i>Schedule item 1 (i): "The extraction or processing of natural gas including gas from landfill sites".</i>
<i>Schedule item 24: "The recommissioning or use of any facility or infrastructure, other than facilities or infrastructure that commenced under an environmental authorisation issued in terms of EIA Regulations 2006, after a period of two years from closure or temporary closure for- (a) electricity generation...; or, (c) facilities for any process or activity, which require permission, authorisation, or further authorisation, in terms of legislation governing the release of emissions or waste prior to the facility being recommissioned."</i>	<i>Schedule item 1 (j): "The bulk transportation of dangerous goods using pipelines, funiculars or conveyors with a throughput capacity of 50 tonnes or 50 cubic metres or more per day".</i>

<p><i>Schedule item 25:</i></p> <p><i>"The expansion of or changes to existing facilities for any process or activity, which requires an amendment of an existing permit or license or a new permit or license in terms of legislation governing the release of emissions, pollution and effluent."</i></p>	
<p><i>Note: (i) the tabulated presentation of activities, on Table One is for convenience only and does not imply that a comparison is being drawn between the activities appearing in the two columns; and, (ii) Table One is not intended as an exhaustive analysis of the application of the NEMA EIA Regulations to a proposed landfill gas to power generation CDM project. Project developers seeking to implement such projects should take specific environmental legal advice.</i></p>	

As the NEMA EIA regime has only recently come into force, CDM project proponents are advised to seek local environmental and environmental legal expertise in assessing the possible application of this regime to any proposed CDM project activity they may wish to undertake.

PART B: THE SOUTH AFRICAN DNA The South African DNA's first public appearance was at a workshop held in December 2004 arranged to herald the operationalisation of this vital component of the CDM architecture. Regulations prescribing the DNA's operation and duties were promulgated in mid-2005 (the DNA Regulations).⁸ Since then, the DNA has become very visible in the CDM market and has made known its determination *inter alia* to promote the CDM domestically, and the country as a CDM investment destination, and to strive to ensure that South African CDM projects achieve the primary goal of the CDM as articulated in the Kyoto Protocol, of assisting Non-Annex I (host) Party countries in achieving sustainable development.⁹

The DNA Regulations designate the Director-General of the Department of Minerals and Energy (DME) as the DNA but, in practice it is run as a sub-directorate of DME staffed by a Director, Deputy-Director and a support team who liaise with project developers and/or their representatives.¹⁰ A Steering Committee consisting of ten members of national government departments, each with a potential interest in the CDM, e.g., the Departments of Trade & Industry and Health, provides supervision and advice to the DNA. Decisions regarding approval or non-approval of CDM projects are made by the DNA in consultation with the Steering Committee. The Regulations provide for a thirty day period for public review of projects seeking DNA approval, which involves publishing the project documentation on the DNA's website and inviting stakeholder comments. This period is in addition to the stakeholder comment period required in the official CDM pipeline.

While not prescribed in the DNA Regulations the *suite* of documentation required to be submitted in support of an application for DNA approval is quite specific and fairly onerous, including the requirement for a draft validated CDM Project Design Document and draft Validation Report. National sustainable development criteria, against which proposed CDM projects are measured, have been elaborated and are available on the DNA's website, along with an explanation of the DNA's application procedure (including the option of an initial screening which provides a preliminary review of the project), a list of the supporting documentation required, and a downloadable template of the DNA's Application Form.

IN CONCLUSION it can be noted that the future of the CDM in South Africa looks positive. Various indicators of this view can be identified. For example, the National Energy Efficiency Policy takes note of the CDM as a financial instrument that can assist in unlocking investment in such measures. As of October 2006, twenty proposed CDM projects have been submitted to the DNA for initial review, and twelve for approval. Current projects in the national pipeline have the potential to reduce greenhouse gas emissions by approximately four million tones of CO_{2e} during the Kyoto period. The most recent meeting of the CDM Executive Board (EB26) registered two additional South African CDM projects, bringing the national total to four (Kuyasa, Waverley, Petro SA, and Lawley projects). Finally, it is anticipated that, in the absence of a review, the eThekweni landfill gas to power generation project (to be implemented on the Mariannhill and La Mercy landfill sites) will be registered as a CDM project activity at approximately the same time as COP12-MOP2 occurs in Nairobi (November 2006).

¹ This article should not be regarded a comprehensive discussion of the topics addressed, nor should this article be regarded as legal advice. Investors are advised to seek specific legal and technical advice in regard to their particular investment.

² EIA processes initiated prior to the promulgation of the NEMA EIA Regulations, i.e., July 2006, may still be processed according to the Environmental Conservation Act. However new EIA applications must be made in terms of the NEMA regime. Future CDM projects which trigger the EIA requirement are most likely to fall into this latter category.

³ 3/CMP.1

⁴ National Environmental Management Act No. 107 of 1998 (as amended), section 24(1).

⁵ NEMA, section 24(2)(a).

⁶ NEMA, section 24(5)(a)&(b)(iii).

⁷ An example of a threshold: "the above ground storage of a dangerous good, including petrol ...in containers with a combined capacity of 1000 cubic metres...". (GNR 614, Schedule, Activity 1(c)).

⁸ National Environmental Management Act, 1998, Regulations for the Establishment of a Designated National Authority for the Clean Development Mechanism, GNR. 721, GG 27788 of 22 July 2005.

⁹ Kyoto Protocol, Article 12(1).

¹⁰ The DNA may be contacted using the following means: Telephone: +27 12 317 8298; e-mail: Victoria.kekana@dme.gov.za; or through their website: <http://www.dme.gov.za/cdm/main.htm>