

Volume 2, Journal 1 - March 2007

25 Degrees in Africa - CDM

CDM and environmental assessment

A recurring theme in CDM project implementation is the necessity of limiting development costs. One way is to minimise the time required for development and for obtaining necessary regulatory approvals.

This is part of a series of articles dealing with legal issues associated with climate change and implementing Clean Development Mechanism (CDM) projects in South Africa. This article considers the question of environmental assessment in the context of South African CDM projects. For context and background to this article please see: *International climate change law, in 25°in Africa, Vol1 No2.*

A recurring theme in CDM project implementation is the necessity of limiting development costs. One way is to minimise the time required for development and for obtaining necessary regulatory approvals. The need to undertake an environmental impact assessment (EIA) prior to project development is one aspect which may attract significant cost. EIA costs include both the direct cost of hiring an environmental assessment practitioner to undertake the EIA, and the indirect costs accruing from potentially extended timeframes before project implementation, e.g., due to appeal and/or review processes challenging an environmental authorisation granted for the project. Obtaining correct advice on the legal and scientific processes involved will assist in managing development costs.

For a CDM project to be properly registered with the CDM Executive Board (a precondition to legitimate generation of saleable emission reductions) confirmation must be provided that documentation on the analysis of the environmental impacts of the project activity has been submitted. If these impacts are considered significant, either by the project participants or the host country, e.g., South Africa, then an EIA must be undertaken in accordance with domestic legal requirements. South Africa has an elaborate, and recently renovated, EIA regime and considerable in-country, legal, environmental and scientific expertise required for the performance of EIA. The regime depends primarily on the identification of certain "listed activities", the performance of which triggers the requirement for an environmental authorisation which, in turn, may be granted only after an EIA has been undertaken and the results assessed.

EIA has been a statutory requirement in South Africa since 1997, when the regime was located in the Environment Conservation Act No. 73 of 1989. This regime, as amended, held sway until July 2006 when the legislative basis for EIA shifted to focus on the National Environmental Management Act No. 107 of 1998 (NEMA). The shift involved certain amendments to NEMA, the promulgation of EIA Regulations in terms of NEMA, and the repeal of the relevant portions of the Environment Conservation Act and related Regulations. Consequently NEMA is now the sole legislative base for EIA, in respect of projects seeking to be implemented after July 2006. Note that, when a CDM project includes performing a listed activity, thus triggering the EIA requirement, granting of the authorisation required for the CDM component of the project is contingent on the granting of the environmental authorisation. The question of authorisation for the CDM component will be addressed in a subsequent article.

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, based on application. Cost and time savings were achievable if an applicant for environmental authorization were able to motivate a less stringent level of EIA. The NEMA 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 and EIA" requirement, which involves a more elaborate process. The NEMA EIA Regulations also impose strict timeframes for completion of components of the EIA process, and introduce certain thresholds below which the EIA requirement may not be triggered.

The eThekweni Municipality's "Durban landfill gas-to-power-generation CDM project", registered as a CDM project in November 2006, is the most recent addition to South Africa's project portfolio. Landfill gas projects are regarded as among the simplest to undertake and we have used this example to provide an indication of how performing a listed

activity may trigger the EIA requirement. Activities may include both landfill gas capture and activities associated with its use. A proposed activity need comprise only one listed activity to trigger EIA.

TABLE

Application of the "listed activities" in the NEMA EIA Regulations to the capture and use of landfill gas for a landfill-gas-to-power generation CDM project

Activities requiring "basic assessment"

(GNR 386, GG 28753 of 21 April 2006) Activities requiring "scoping & EIA"

(GNR 387, GG 28753 of 21 April 2006)

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." 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."

Schedule item 16(f): "The transformation of undeveloped, vacant or derelict land to recycle, handle, store temporarily or treat hazardous waste." Schedule item 1 (g): "The use, recycling, handling, treatment, storage or final disposal of hazardous waste".

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." Schedule item 1 (i): "The extraction or processing of natural gas including gas from landfill sites".

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." 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".

Schedule item 25: "The expansion of or changes to existing facilities for any process or activity, which require an amendment of an existing permit or licence or a new permit or licence in terms of legislation governing the release of emissions, pollution and effluent."

Note: (i) the tabulation of activities is for convenience only and does not imply that a comparison is being drawn between the activities appearing in the two columns; and, (ii) this table 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.

Given that the NEMA EIA regime has relatively 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.

IMBEWU Enviro-Legal Specialists (www.imbewu.co.za) is a specialist environmental legal consultancy providing professional legal consultancy services in the area of environmental, health & safety and climate change law. Andrew Gilder (andrew@imbewu.co.za) drives IMBEWU's climate change and CDM legal advisory practice, currently into its fourth year of operation, which counts among its clients state and provincial governments, CDM project developers and investors, and purchasers of carbon credits.

This article should not be regarded as a comprehensive discussion of the topics addressed, and should not be taken as legal advice or relied upon. Those seeking to participate in climate change-related activities are advised to seek specific legal advice.

Andrew Gilder and Melissa Basterfield (IMBEWU Enviro-Legal Specialists (Pty) Ltd.)

Imbewu Enviro-Legal Specialists – Andrew Gilder

Tel: +27 (11) 325 4928

Fax: +27 (11) 325 4901

E-mail: andrew@imbewu.co.za

Website: www.imbewu.co.za

Clean Development Mechanism (CDM) projects are implemented under the aegis of the Kyoto Protocol to the United Nations Framework Convention on Climate Change, and involve the undertaking of activities that seek to reduce emissions of certain greenhouse gasses, and to achieve sustainable development benefits in the area of their implementation. A financial incentive to implement a CDM project is the possibility of the project be awarded saleable 'carbon credits' equivalent to the volume of greenhouse gas emission reductions achieved. The carbon credit associated with a CDM project is called a Certified Emissions Reduction (CER) and is an internationally tradeable commodity.