



International Rivers' Comments on the Non-paper on a Common Understanding of Article 11b (6) of Directive 2003/87/EC as amended by Directive 2004/101/EC and the Draft Compliance Report Assessing Implementation of Article 11b(6) to Hydro-electric Projects Exceeding 20 MW

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EXECUTIVE SUMMARY

International Rivers strongly supports Article 11b(6)'s requirement that all hydropower credits that enter the ETS come from projects that meet the rigorous standards for environmental and social performance set out in the Final Report of the World Commission on Dams. Moreover, we welcome the Member States' efforts to ensure that Article 11b(6) is consistently applied throughout the EU, and we appreciate the opportunity to comment. However, we believe that some of the procedures and criteria proposed in the Non-paper and Draft Compliance Report template should be strengthened to more closely align them with the WCD's core policy objectives:

- The Non-paper does not incorporate the mechanisms for gaining public acceptance and ensuring compliance that were endorsed by the WCD, and otherwise may not provide adequate opportunities and assurances of effective public participation (addressed in Section II, below). The reliance on DOEs as the certifying agency is particularly worrisome given the DOEs' record of low competence and lack of independence from project developers in the CDM validation process;
- Some of the proposed criteria for assessing substantive compliance with the WCD do not fully capture the WCD's principles and requirements (addressed in Section III).

I. INTRODUCTION: ARTICLE 11B(6) OF THE LINKING DIRECTIVE

Hydropower projects represent a large and growing proportion of carbon credits in the Clean Development Mechanism/Joint Implementation (CDM/JI) project pipeline.¹ Recognizing that participation in CDM/JI projects is voluntary, the Linking Directive sought to adopt rigorous standards to encourage project sponsors to improve the social and environmental performance of these projects. Accordingly, Article 11b(6) of the ETS Directive requires Member States to only accept CDM/JI emissions credits from large hydropower projects that meet relevant international criteria and guidelines, including those adopted by the World Commission on Dams.²

To date, however, Member States have implemented Article 11b(6) with varying degrees of rigor. Inconsistencies in the application of this provision have raised doubts about the environmental and social integrity of credits entering the ETS. Concerns have also been raised that the ETS market will fracture as project sponsors shop their projects to Member States with weaker procedures and Member States with more robust standards decline to accept those credits.

These threats to the integrity and coherence of the market for hydropower credits have led the Member States to seek to harmonize Member States' procedures and criteria for approving credits under Article 11b(6). Towards this end, Working Group 3: Emissions Trading of the Climate Change Committee and the Commission have created an *ad hoc* working group to develop a common set of guidelines and procedures for Member States to consider on a voluntary basis. The *ad hoc* working group has produced two documents for public comment: (1) a draft guidance paper for European DNAs/DFPs on how to interpret Article 11b(6); and (2) a Draft Compliance Report template that sets out the criteria that Member States should apply to ensure compliance with Article 11b(6).

II. COMMENTS ON THE NON-PAPER'S PROCEDURES FOR ASSESSING COMPLIANCE

1. WCD Sanctioned Compliance Mechanisms Should Be Integrated into Article 11b(6) Determinations.

The Non-paper proposes that Member States assess compliance with Article 11b(6) based upon submissions and documentation provided by the project sponsor and

¹ European Commission, *Application of Art. 11b(6) of the ETS Directive on the World Commission on Dams recommendations by the Member States on the acceptance of carbon credits from JI/CDM hydro projects with a generating capacity exceeding 20MW: Analysis of Survey Results*, at 1 (9 January 2008).

² Article 11b(6) of the Directive 2004/101/EC provides:

In the case of hydro–electric power production project activities with a generating capacity exceeding 20MW, Member States shall, when approving such project activities, ensure that relevant international criteria and guidelines, including those contained in the World Commission on Dams year 2000 Final Report, will be respected during the development of such project activities.

its consultants. Thus, in addition to its other CDM/JI application materials, project sponsors would be required to submit an Article 11b(6) Compliance Report to the Designated National Authority (DNA) of the Member State, or other entity selected by the Member State to fulfil this function. The Compliance Report must be validated by a Designated Operational Entity (DOE) or an Accredited Independent Entity (AIE) or other qualified independent third-party recognised by the Member State. (*Non-paper*, p. 5). Project sponsors would not be required to include the comments or objections of affected peoples in the Compliance Report, although the Non-paper considers such inclusion to be best practice. (*Non-paper*, page 6).

This sponsor-driven approach to validating compliance is directly at odds with the inclusive and participatory mechanisms envisioned by the WCD. Through its strategic priorities of “Gaining Public Acceptance” and “Ensuring Compliance,” the WCD articulated three principles that an acceptable compliance review mechanism must meet. First, it must be participatory and inclusive. One of the WCD’s “core values” for improving development effectiveness was “participatory decision-making.” (WCD, p. xxxii-xxxiii). Throughout the report, the WCD expressed an unwavering commitment to including affected stakeholders in participatory decision-making processes at all stages of project development, approval and implementation, including compliance reviews. Second, compliance assessments must be independent to ensure credibility with all stakeholders. (WCD, Principle 6.1, p. 244). Third, they must also be transparent. (WCD, Principle 6.1, p. 244).

The WCD specifically endorses the use of two mechanisms that are independent and transparent, and empower affected people to ensure that government agencies and project sponsors comply with their legal obligations and other commitments. These include:

- ***Legally Binding “Compliance Plans” Negotiated Through Stakeholder Forums:*** The WCD proposes that public acceptance of key decisions should be demonstrated through legally binding agreements that are negotiated in recognized stakeholder bodies such as stakeholder forums. (p. 215). Such binding agreements should include “compliance plans” that specify (a) how compliance with relevant criteria and guidelines will be achieved; (b) binding arrangements for technical, social and environmental commitments; and (c) clear, implementable institutional arrangements for monitoring compliance. (pp. 217-218, 247, 271);
- ***Independent Review Panels:*** The WCD proposes that compliance could be monitored by independent panels of experts convened by a multi-stakeholder advisory group. These Panels would have the power to invoke binding provisions of the Compliance Plan, and would be required to publicize all information related to its decisions. (p. 246);

In order for a project to comply with the WCD at the time of its application for emissions credits, a stakeholder forum and/or independent review panel should have already been put in place. The Non-paper’s proposal to assess compliance with the WCD

based on evidence and documentation provided by the project sponsor (or entities in its employ) would circumvent and potentially undermine these WCD-required compliance mechanisms. Moreover, given the widespread concerns over the independence and competence of DOEs in their role as project validators³ and our experience with the extremely poor quality of DOE compliance reports,⁴ we strongly believe that the DOEs cannot be relied upon to be objective auditors of WCD compliance. (Obviously we also believe that developers cannot be allowed to do self-assessments of their WCD compliance.)

In order to ensure that DOE's and project sponsors are accountable to project-affected peoples in their claims of WCD compliance, the stakeholder forum, independent review panel, and other mutually agreed compliance mechanisms specified in the WCD should be afforded an opportunity to influence the Member State's determination of Article 11b(6) compliance. They should be invited to submit their own "compliance assessment report", and to comment on the Article 11b(6) materials submitted by the project sponsors, its consultants and the DOE or AIE.

2. The Effectiveness and Inclusiveness of Local Participatory Processes Should Be Independently Verified.

Given the importance of public participation to the WCD decision-making framework, it is imperative that participatory processes be shown to be fair, inclusive, legitimate and meaningful. In order to ensure that the outcome of these processes accurately reflects stakeholder preferences, the German Government's guidelines for determining compliance with Article 11b(6) requires, "[r]eports or statements by regional authorities and non-government organisations (NGOs) with local knowledge are consulted to validate the consultation process." (DEHSt, *JI and CDM: Hydroelectric Power Projects Over 20MW: Guidelines for Determination for Compliance with the Recommendations of the World Commission on Dams Regarding Hydroelectric Power Projects with a Capacity over 20MW, within the Context of Joint Implementation (JI) and Clean Development Mechanism (CDM) Projects*, at 11 (31 October 2007)).

We believe independent verification of the quality and legitimacy of consultative processes is essential to ensuring WCD-compliance, and recommend that the working group incorporate the German approach into its guidelines for Article 11b(6) compliance.

³ See e.g. Schneider, L. (2007) "Is the CDM Fulfilling its Environmental and Sustainable Development Objectives? An Evaluation of the CDM and Options for Improvement." Report prepared for WWF by Öko-Institut, 5 November.

⁴ International Rivers' Critique of the Xiaoxi World Commission on Dams Compliance Report, May 2008.

3. Member States' Approval Processes Should Be Consistent with Their Commitments Under the Aarhus Convention.

The *UN/ECE Aarhus Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters (25 June 1998)* (Aarhus Convention) provides a further basis for Member States to ensure that directly affected persons and other members of the public have the opportunity to participate in the decision to approve emissions credits under Article 11b(6). Article 6 of the Aarhus Convention requires Parties to provide public notice and opportunities for effective public participation in permitting and other decisions regarding proposed activities that may have a significant effect on the environment. The acceptance of CER credits from hydropower projects greater than 20 MW is such a decision, as it provides the purchaser of a credit permission to emit significant additional amounts of carbon from its EU operations.

Nevertheless, the procedures for approval of emissions credits under Article 11b(6) proposed in the Non-paper do not specify clear mechanisms for the public to participate in credit application decisions, as required by the Aarhus Convention. We believe that the Non-paper should explicitly reference the Aarhus Convention's notice and public participation requirements in its proposed approval processes.

III. COMMENTS ON THE COMPLIANCE REPORT TEMPLATE

Overall, we believe that the Draft Compliance Report Template does a commendable job of translating the principles and recommendations of the WCD into a coherent set of auditable criteria for Member States to use in making Article 11b(6) determinations. We believe, however, that certain criteria could be strengthened and better aligned with the WCD's core policy objectives, as described below:

Section 1: Gaining Public Acceptance

(1) The first two bullet points:

- Confirmation that the interested local people have been informed of the impacts on their quality of life and involved in the decision process of building the power plant; and
- How has the Stakeholder Analysis been carried out?

Should be replaced with:

- *Confirmation that all stakeholders, identified through stakeholder analysis, have had the opportunity for informed participation in decision-making processes related to the project through stakeholder fora.*

(2) The third bullet point:

- How have the local and indigenous community and stakeholders at risk participated in the decision-making process?

Should be replaced with:

- *Demonstrate that decisions affecting indigenous peoples have been taken with their free, prior and informed consent.*

(3) The eighth bullet point should be deleted, since the topic of agreements will be dealt with later in the chapter on “Recognising Entitlements and Sharing Benefits”.

Section 2: Comprehensive Options Assessment

(1) The fourth bullet point should be retained, but the other bullet points should be replaced with the following two paragraphs:

- *Demonstrate that development needs and objectives have been clearly formulated through an open and participatory process, before project options are identified.*
- *Demonstrate that a balanced, participatory and comprehensive assessment of all options has been conducted, giving social and environmental aspects the same significance as technical, economic and financial factors.*

Section 3: Addressing existing dams

(1) The following paragraph should be added to this section:

- *Demonstrate that before a decision is taken to build a new dam, outstanding social and environmental issues from existing dams in the river basin have been addressed with the participation of affected people, and the benefits from existing projects have been maximised.*

Section 4: Sustaining Rivers and Livelihoods

(1) The third bullet point:

- Is the project planned with a precautionary approach with regard to ensuring livelihood and the environment?

Should be replaced with:

- *Demonstrate that the project was selected based on a basin-wide assessment of the river ecosystem and an attempt to avoid significant impacts on threatened and endangered species.*

(2) The fifth bullet point:

- Describe the measures taken to minimise the impact of reduced flow in the affected river – is the environmental safe minimum flow ensured?

Should be replaced with:

- *Demonstrate that the project provides for the release of scientifically determined environmental flows to help maintain downstream ecosystems.*

Section 5: Recognising Entitlements and Sharing Benefits

(1) The second bullet point:

- Are mitigation and compensatory measures mutually agreed with all recognised adversely affected people?

Should be replaced with:

- *Demonstrate that affected people have been able to negotiate mutually agreed and legally enforceable agreements to ensure the implementation of mitigation, resettlement and development entitlements.*

(2) The third bullet point:

- In what way will the affected local and indigenous population's livelihoods be improved due to the project?

Should be replaced with:

- *Demonstrate that the project provides entitlements to affected people to improve their livelihoods and to ensure that they receive the priority share of project benefits.*

Section 6: Ensuring Compliance

(1) The first bullet point:

- What will be done to ensure that relevant laws, regulations, agreements (including resettlement and compensation agreements) and recommendations are followed?

Should be replaced with:

- *Demonstrate that mechanisms to ensure compliance with regulations and negotiated agreements are developed and budgeted for.*

(2) The sixth bullet point:

- Will the compensation measures be independently audited?

Should be replaced with:

- *Demonstrate that compensation measures and compliance mechanisms will be independently audited.*

Section 7: Sharing Rivers for Peace

(1) The first bullet point:

- Does the project have trans-boundary impacts? - If so, give details of agreement(s) between affected countries, considering international recommendations for trans-boundary water projects and describe how this affects the project.

Should be replaced with:

- *If a dam is planned on a shared river, demonstrate that the riparian states do not object to the project.*