

EB 57

Inputs from Designated Operational
Entities and Applicant Entities

'Draft procedure regarding the correction of significant deficiencies and the excess issuance of CERs'

- ❑ The DOE Forum would like to thank the Board for the opportunity to provide public comments
- ❑ This issue is of vital importance to all entities and the Forum has raised serious concerns on some aspects of the draft procedure
- ❑ The DOE Forum has made a written submission agreed by all entities
- ❑ We hope that in this presentation we can further clarify and elaborate on the points made in our written submission

Compliance with CMP Decisions

- ❑ The CMP decisions date back to 2001, and lack detail on how DOE liability should be implemented, stating that 'significant deficiencies' need to be identified in reports
 - ❑ The Draft procedures go beyond the CMP decisions in applying 'strict liability' and 'regardless of intent or degree of negligence'
 - ❑ 'Significant deficiency' is in fact interpreted as *any* deficiency leading to excess CERs under the procedure
 - ❑ This fails to recognise the culpability of the entity, and whether the entity could have done anything to prevent the excess issuance, and does not provide a satisfactory solution where:
 - the DOE was provided false information by PPs or recognised 3rd parties;
 - facts that are known today were not known and could not be reasonably known to the DOE at the time;
 - deficiencies existed with the applicable methodologies or tools, or if standards or interpretations/clarifications of rules have changed.
 - ❑ Liability should be assessed based on principle of negligence i.e. wilful neglect or misconduct
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Recommended changes to CMP decisions

- Clarifying and restricting DOE Liability to situations of negligence
 - The excess issuance must be reasonably foreseeable by the DOE,
 - It must be the result of the DOEs actions or neglect,
 - It must be fair, just and reasonable to impose liability upon the DOE
 - Placing a time limit on Liability
 - A review of projects carried out at a much earlier stage will inadvertently be influenced by the understanding and new interpretations brought about by subsequent experience
 - Without a time limitation on liability it becomes very difficult to manage and insure against the liability and also undermines the ability of the CDM mechanism to recoup excess issued CERs
 - Institution of an appeals process
 - Any organisation facing this level of liability and penalty should have the right of appeal to an independent body
 - Costs: If the DOE was not negligent, it should not have to pay for the costly review process
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Recommended changes to CMP decisions (2)

Use of a second DOE - Conflict of interest

- ❑ DOEs would have significant conflicts of interest if undertaking these reviews
- ❑ The DOE would effectively have significant influence over the accreditation, the ability to operate, and even the financial viability of a competitor entity
- ❑ The DOE would be able to access commercially sensitive and proprietary intellectual property
- ❑ Severe capacity constraints exist
- ❑ DOE Forum proposes a panel of experts be used instead, including staff from different DOEs, plus UNFCCC

Market implications

- Creates perverse incentives for PPs to defraud DOEs
- Undermines the ability of entities to insure against the liability for new projects
- Old validations & verifications would not be covered against the new rules
- The scale of liability is orders of magnitude greater than the financial returns from operating as a DOE. DOE fee rates could not cover such open ended and unlimited liability.
 - Entities will have to reassess whether they can afford to participate in the CDM
- Entities may withdraw from the market, or from certain sectors, project types or clients
- Capacity constraints will be seriously exacerbated
- Increase in costs would have to be passed on to PPs
- Complex projects, and clients in LDCs, would be hit hardest

Suggested revisions to lessen market impact (2)

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- The same points mentioned in slide 4 apply, i.e.
 - Clarifying and restricting DOE Liability to situations of negligence
 - The excess issuance must be reasonably foreseeable by the DOE,
 - It must be the result of the DOEs actions or neglect,
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Suggested revisions to lessen market impact

- Strictly define terms e.g. 'significant', 'deficiency', 'fact', 'CDM rule' etc
- Institute a reserve/insurance fund to cover excess CERs
 - Where the DOE is not responsible
 - Where the excess CERs cannot be reclaimed from future issuances
 - Where the DOE no longer exists
- DOEs be required to hold insurance up to a reasonable amount.
 - Excess liability above this limit, i.e. where the DOE is not insured, could be managed by the reserve fund
- Do not apply the procedure retroactively, as this would punish early movers and undermine insurance cover
- Appoint a panel of experts rather than using a 2nd DOE

If a PP provides false or misleading information

- ❑ This must be addressed to avoid perverse incentives
- ❑ Require a written undertaking from all PPs
- ❑ Impose sanctions on the project if the PP has defrauded or misled the DOE/UNFCCC – stop future issuances, or deduct from future issuances
- ❑ Establish a reserve fund
- ❑ Do not assume that DOEs can pass on liability to their clients. This is not legally enforceable by DOEs