

Environmental Law

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KENYA

Kenya unveils Carbon Market Regulations



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Kenya unveils Carbon Market Regulations

The gazettelement of the Climate Change (Carbon Markets) Regulations, 2024 (Regulations) on 17 May 2024, has set the stage for the regulatory oversight of carbon project development and management in Kenya. The Regulations have been enacted following a legal reform process that began with the amendment of the Climate Change Act, 2016 (Act) in 2023 to explicitly address carbon market concerns, and signal Kenya's readiness to intensify efforts to take on opportunities presented by the global carbon markets. The Regulations introduce the key provisions outlined below.

Carbon project development and management process

All carbon projects, whether geared towards voluntary or compliance carbon markets must follow the project approval process laid out in the Regulations. The process starts with the project proponent submitting its project concept note, following which a successful applicant is issued with a letter of no objection by the Designated National Authority (DNA). The process concludes with the issuance of a letter of approval from the DNA, following the project proponent's submission of its project design document. Once a carbon project receives a letter of approval, the project proponent has an obligation to commence the project within 12 months (or make a request for additional time). Project proponents must also notify the DNA of all instances of carbon credit issuance and submit annual reports on the progress of their carbon project.

Institutional framework

An elaborate institutional framework to provide oversight of carbon projects in Kenya has now been introduced. In particular, as the entity granted the responsibility to authorise and approve carbon projects, the DNA has a critical role to play in implementing the Regulations. In this role, the DNA appoints project specific ad hoc committees drawn from a larger multi-sectoral technical committee, to review project design documents. The DNA also monitors registered carbon projects and project proponent compliance with the Regulations. The DNA is to head the National Carbon Registry and as the National Registrar, is also required to liaise with registrars of sector carbon registries which may be established in the energy, transport, agriculture, forestry and land use, industrial processes and product use, and waste sectors.

Benefit sharing

An annual social contribution to communities where carbon projects are established on public and community land is mandatory under the Act. The required amount set out is at least 40% of the aggregate earnings of the previous year, less the cost of doing business for land-based carbon projects; and at least 25% of the aggregate earnings of the previous year, less the cost of doing business for non-land-based carbon projects. In the case of land-based projects, details of the annual social contribution and its mode of disbursement shall be included in the Community Development Agreement (CDA) entered into between the project proponent and the relevant community.

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The CDA must be in the form provided for under the Fourth Schedule of the Regulations. In the case of non-land-based projects, the DNA shall remit the annual social contribution to the Climate Change Fund.

Article 6 of the Paris Agreement

The Regulations set out some modalities of Kenya's engagement in Article 6 of the Paris Agreement by setting out the form a project proponent should use to request authorisation for international transfer of mitigation outcomes and the form of letter of authorisation which the DNA shall issue to a project proponent seeking authorisation. The Regulations are clear that corresponding adjustments will be applied to all such authorisations to ensure there is no double counting, and project proponents will be required to pay a corresponding adjustment fee. The DNA is required to issue guidelines on Article 6.2 and 6.4, and it is anticipated that these guidelines will be issued in the course of time to provide further clarity on Kenya's requirements for engagement with Article 6, including publication of a whitelist highlighting the activities or technologies preferred by the Government of Kenya for Article 6.2 bilateral co-operation.

Offences and penalties

Where a project proponent commits an offence under the Regulations, such as failing to submit an annual progress report, the proponent will be liable on conviction to a fine of not more than KES 20,000 or imprisonment for not more

than six months, or both. However, project proponents should be aware that under the Act, more stringent penalties are laid out, including for anyone who willingly conducts unauthorised trade in carbon credits, knowingly gives false or misleading information with respect to environmental or financial gains from the carbon market investment, manipulates carbon credit measurements in order to claim addition measurements, engages in money laundering through carbon trading, knowingly sells carbon credits to unauthorised entities, or fails to maintain carbon records. In these cases, on conviction, the penalty set out is a fine not exceeding KES 500 million or imprisonment for a period not exceeding 10 years, or both.

Transitional requirements

Project proponents engaged in a project before the Regulations come into operation, are required to be compliant within two years of commencement of the Regulations. Ongoing projects (those operational in Kenya and developed before the commencement of these Regulations) must, however, note that they are required to undertake an environmental audit within six months of commencement of the Regulations.

Should you have any queries or require further information, please reach out to: Clarice Wambua at Clarice.Wambua@cdhlegal.com

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BBBEE STATUS: LEVEL ONE CONTRIBUTOR

Our BBBEE verification is one of several components of our transformation strategy and we continue to seek ways of improving it in a meaningful manner.

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