



Council

Distr.: General
31 January 2022

Original: English

Twenty-seventh session

Council session, part I

Kingston, 21 March–1 April 2022

Item 11 of the provisional agenda*

Draft regulations on exploitation of mineral resources in the Area

Draft standard and guidelines on the form and calculation of an Environmental Performance Guarantee

Prepared by the Legal and Technical Commission

Standard on the form and calculation of an Environmental Performance Guarantee

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* ISBA/27/C/L.1.



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I. Introduction

1. Regulation 26 of the regulations on exploitation of mineral resources in the Area (“regulations on exploitation”) requires a Contractor to provide an Environmental Performance Guarantee (the “Guarantee”) in favour of the International Seabed Authority to meet the likely costs, expenses and liabilities that may result from:

- (a) The premature closure of Exploitation activities;
- (b) The decommissioning and final closure of Exploitation activities, including the removal of any Installations and equipment; and
- (c) The post-closure monitoring and management of residual Environmental Effects (together the “EPG scope”).

2. In accordance with the regulations on exploitation, an Applicant seeking approval of a Plan of Work shall provide details of its proposed Guarantee as part of the application to be considered by the Legal and Technical Commission and the Council.

3. An Applicant shall satisfy the Commission that it will meet the obligations under regulation 26 by:

- (a) Adopting an independently validated method of calculation for 100 per cent of the estimated costs, expenses and liabilities of the EPG scope; and
- (b) Submitting, in the prescribed form, both an Environmental Performance Guarantee Declaration and an Environmental Performance Guarantee Confirmation to the Commission.

4. The Applicant shall calculate the costs, expenses and liabilities on a third-party basis, meaning that, in the calculation, it shall be assumed that the works and activities within the EPG scope are carried out by a third party rather than by a Contractor.

5. If the Applicant’s Guarantee proposal and Plan of Work are approved by the Council, the Applicant (as the Contractor) shall lodge the Guarantee with the Authority no later than the date on which production in the approved Mining Area commences.

6. At all times, the Contractor shall:

- (a) Maintain a sufficient guarantee for the life of the Exploitation Contract and, in certain circumstances, beyond the term of the Exploitation Contract;
- (b) Ensure that the Authority can access the guarantee to meet the costs, expenses and liabilities of the EPG scope; and
- (c) Remain fully responsible and liable in accordance with the regulations on exploitation for the Contractor’s obligations under the Exploitation Contract and approved Plan of Work, regardless of any Guarantee provided to the Authority.

II. Scope

A. Purpose

7. The present standard provides details of how the Authority will administer the requirement for an Environmental Performance Guarantee.

8. The present standard explains:

(a) The process that an Applicant shall follow to demonstrate to the Commission that it has proposed an adequate and appropriate Environmental Performance Guarantee, including by:

- (i) Identifying appropriate forms of guarantees;
 - (ii) Meeting the requirement for an independently validated method to calculate the greatest reasonably credible costs, expenses and liabilities associated with the EPG scope;
 - (iii) Filing an Environmental Performance Guarantee Declaration with the Authority; and
 - (iv) Submitting an Environmental Performance Guarantee Confirmation with the Authority prior to lodging the Guarantee;
- (b) The process for review and revalidation of the Guarantee; and
- (c) The process for repayment or release of the Guarantee.

9. The present standard should be read in conjunction with the equivalent sections of the Guidelines on the form and calculation of an Environmental Performance Guarantee.

B. Definitions

10. Except as otherwise specified herein, terms and phrases defined in the regulations on exploitation have the same meaning in the present standard.

III. Requirements under the regulations on exploitation relevant to the Environmental Performance Guarantee

A. Requirement to meet costs, expenses and liabilities

11. The Guarantee is required to cover all costs, expenses and liabilities that a Contractor is unable to meet and that fall within the EPG scope.

12. The Guarantee is not intended to cover ordinary and foreseen operating costs, such as the costs of compliance with the conditions of the Exploitation Contract, or tortious liability for environmental damage.

13. An Applicant or Contractor shall estimate costs, expenses and liabilities that may arise in respect of the items listed in regulation 26 (2) on a third-party basis, which shall be estimated by the Applicant or Contractor in a conservative manner, assuming the greatest reasonably credible costs for each item.

B. Forms of the Environmental Performance Guarantee

14. Recommendations on the form of the Guarantee are set out in the accompanying guidelines. Changes to the form of a Guarantee following approval of a Plan of Work shall require the consent of all parties involved and shall be approved by the Council.

IV. How to demonstrate a sufficient Guarantee

A. A proposed Guarantee is a condition for approval of a Plan of Work

15. In accordance with the regulations, a proposal for a Guarantee must be part of an application for approval of a Plan of Work.

16. An Applicant seeking approval of a Plan of Work shall prepare a Plan of Work that includes details of the proposed Guarantee, including:

- (a) The proposed form of the Guarantee;
- (b) The calculation methodology of the Guarantee; and
- (c) The Guarantee's terms and conditions.

17. An Applicant shall propose a Guarantee in a form that is acceptable to the Council by:

(a) Estimating the greatest reasonably credible third-party costs, expenses and liabilities under the EPG scope and based on the Applicant's Closure Plan;

(b) Using a robust calculation tool for calculating the third-party costs, expenses and liabilities that may arise under the EPG scope and based on the Applicant's Closure Plan;

(c) Producing a Validation Statement prepared and signed by an independent validator confirming that the form and calculation adopted by the Applicant is accurate; and

(d) Submitting in the prescribed form, an Environmental Performance Guarantee Declaration and an Environmental Performance Guarantee Confirmation to the Commission.

B. How to determine the form of the Guarantee

18. An Applicant or Contractor shall identify the forms of Guarantee that will be offered for consideration by the Commission. Recommended forms of Guarantee are contained in the accompanying guidelines.

C. How to calculate the Guarantee

19. An Applicant or Contractor shall use a suitably robust cost estimation tool for calculating the greatest reasonably credible costs, expenses and liabilities that may arise from the items listed in regulation 26 (2).

20. An Applicant or Contractor shall select a cost-estimation tool to estimate the greatest reasonably credible costs, expenses and liabilities that are appropriate for the completion of its Closure Plan under the proposed Plan of Work. The "greatest reasonably credible costs" is an objective standard by which the Authority and Contractors can determine the extent of the Guarantee required. The Applicant or Contractor shall estimate the greatest reasonably credible costs on a "worst-case scenario" basis.

21. A Guarantee is required for all contiguous and non-contiguous Mining Areas to which a Plan of Work relates.

22. If an Applicant has proposed two or more non-contiguous Mining Areas in its Plan of Work, and the Commission has approved the Applicant's submission of a single set of documents in accordance with regulation 7 (4), the Applicant shall:

(a) Estimate the greatest reasonably credible costs, expenses and liabilities that may arise from the EPG scope across all Mining Areas; and

(b) Produce a single form and calculation of financial guarantee for consideration by the Commission.

23. In the event that the Applicant submits one form and calculation of financial guarantee pursuant to paragraph 22 of the present standard and the Commission subsequently requires that separate documents are required under regulation 7 (4), the Applicant shall submit separate forms and calculations of Guarantees for each non-contiguous Mining Area in accordance with the regulations and the present standard.

D. How to provide the Guarantee by way of instalments

24. An Applicant may propose that the amount of the Guarantee be provided by way of instalments over a specified period.

25. Where an Applicant proposes that the amount of the Guarantee be provided by way of instalments, the Applicant shall specify: (a) the period, including the intervals, for the provision of the Guarantee; and (b) the amount of each instalment.

26. The Applicant shall ensure that at all times any instalment amount will cover all existing costs to meet the requirements of regulation 26 (2) in accordance with the Applicant's Plan of Work.

27. If the Applicant's proposal to provide the Guarantee by way of instalments is approved, the intervals and the amount of the instalment shall be specified in the Exploitation Contract.

E. Requirement for an independent Validation Statement

28. An Applicant or Contractor shall independently validate the form and calculation of the proposed Guarantee and produce a Validation Statement that has been prepared and signed by an independent validator, confirming that the form and calculation adopted by the Applicant or Contractor is accurate.

29. A validator appointed by an Applicant or Contractor shall be:

(a) Competent in their respective field and independent; and

(b) Required to submit a statement of independence with their Validation Statement.

30. The Validation Statement shall include:

(a) A statement of the validator's qualifications and experience;

(b) A statement of the validator's independence vis-à-vis the Applicant or Contractor;

(c) A concise explanation of the validation method used by the validator and of the method used by the Applicant or Contractor to calculate the amount of Guarantee required; and

(d) Confirmation that the calculation method adopted by the Applicant or Contractor takes into account the economic, geological, environmental and geographical features of the project.

31. An Applicant or Contractor shall produce the Validation Statement at the time of submitting the proposed Guarantee as part of an application for a Plan of Work or review.

F. Environmental Performance Guarantee Declaration

32. The Commission has developed an Environmental Performance Guarantee Declaration form.

33. When proposing a Guarantee to the Commission, an Applicant shall also include a completed Environmental Performance Guarantee Declaration.

34. In the Declaration, the Applicant is required to certify that:

(a) It is and will remain compliant with the regulations on exploitation, including regulation 26, for the duration of the Exploitation Contract; and

(b) It formally acknowledges its legal duty to maintain and make accessible the approved Guarantee over the life of the Exploitation Contract.

35. The Commission requires that the Declaration be provided prior to or at the time of submission of an application for a Plan of Work.

36. An Applicant shall ensure that valid declarations are in place for all Plans of Work to which a Guarantee relates prior to submitting the proposed Guarantee to the Commission.

G. Environmental Performance Guarantee Confirmation

37. The Commission has developed an Environmental Performance Guarantee Confirmation Form.

38. When lodging the Guarantee in accordance with regulation 26 (1), a Contractor shall also submit an Environmental Performance Guarantee Confirmation to the Commission, attesting that a Guarantee in the form approved by the Council has been lodged in favour of the Authority.

39. In the Confirmation, the Contractor is required to certify that:

(a) A robust cost-estimation tool was used to estimate the greatest reasonably credible costs, expenses and liabilities, as required under regulation 26 (2);

(b) The cost-estimation tool used was appropriate for the nature and scale of impacts that could arise under the Closure Plan and the Guarantee conforms to the Authority's endorsed method; and

(c) The approved Guarantee contained in the Plan of Work has been lodged in favour of the Authority.

40. The Contractor shall lodge an updated Confirmation in the event that there is a Material Change to the approved Plan of Work, including the Guarantee.

H. Environmental Performance Guarantee for multiple Contractors

41. The Commission acknowledges that in some circumstances there will be more than one individual or entity registered as the Contractor for a Mining Area.

42. Where a Group or Consortium of entities submits an application for approval of a Plan of Work, the Environmental Performance Guarantee Declaration form provides that each member of the Group or Consortium shall submit a Declaration stating that it will comply with the requirements of regulation 26.

43. In the submission of a Plan of Work, the lead member of the Group or Consortium shall:

(a) Calculate the level of the Guarantee required by the Group or Consortium to meet the obligations contained in regulation 26 for the proposed Plan of Work in accordance with the present standard;

(b) Confirm to the Commission that the Group or Consortium (as opposed to the members of that Group or Consortium) holds or will hold a sufficient Guarantee for the duration of the Plan of Work;

(c) Confirm to the Commission that the forms of the Guarantee that the Group or Consortium hold will be immediately accessible by the Authority at the point when costs, expenses and liabilities arise under the EPG scope and are unable to be met;

(d) Inform all other members of the Group or Consortium for the proposed Plan of Work of the total amount of the Guarantee to be held;

(e) Confirm with all other members of the Group or Consortium for the proposed Plan of Work that the lead member has submitted all Declarations, with the consent of other members, to the Commission for the relevant Application; and

(f) Provide an Environmental Performance Guarantee Confirmation to the Authority upon lodging the Guarantee.

44. All other members of the Group or Consortium for the Plan of Work shall:

(a) Confirm to the Commission that the Group or Consortium holds or will hold a sufficient Guarantee for its Plan of Work;

(b) Confirm to the Commission that the forms of the Guarantee that the Group or Consortium hold and will hold will be immediately accessible by the Authority at the point when costs, expenses and liabilities arise under the EPG scope and are unable to be met; and

(c) Inform the lead member of the Consortium or Group that an Environmental Performance Guarantee Confirmation has been provided to the Commission.

45. The Group or Consortium shall provide a proposal for and hold a Guarantee for its Plan of Work in the name of the Group or Consortium or in the name of one individual member of the Group or Consortium.

V. Ongoing responsibilities

46. The Contractor is at all times responsible for maintaining the form, amount and accessibility of the approved Guarantee, including to notify the Secretary-General within 90 days if there is a change of control in the entity providing the Guarantee.

47. This responsibility cannot be discharged by affiliates, related companies, subcontractors or other entities who are not the Contractor.

VI. Repayment or release of a Guarantee

48. The Contractor's closure obligations are set out in the regulations on exploitation.

A. Release in full

49. The entire Guarantee shall be released when:

(a) All of the requirements of the Closure Plan that include likely costs required for the EPG scope have been fulfilled and the Commission has approved the final performance assessment under regulation 61 (3); or

(b) The Council has approved the transfer of rights and obligations under an Exploitation Contract under regulation 23 and the new Contractor (transferee) has deposited a Guarantee in accordance with regulation 26; or

(c) There is a change of control under regulation 24, the Secretary-General has required that the Contractor lodge a new Guarantee under regulation 24 (3) (c) and the Contractor has lodged a new Guarantee in accordance with regulation 24 (3) (c).

B. Release in part

50. Subject to paragraphs 51 and 52, part of the Guarantee may be released, upon the Contractor's request, where:

(a) The Council has approved a final Closure Plan under regulation 60; and

(b) The Contractor has implemented the final Closure Plan in accordance with the conditions of its implementation and reported the results on the progress of such implementation to the Secretary-General in accordance with regulation 61 (1); and

(c) The implementation of the final Closure Plan has removed any risk of liability in respect of costs relating to the items prescribed in regulation 26 (2) (a) and (b).

51. Where a Contractor has requested partial release of its Guarantee, the Commission shall either:

(a) Recommend to the Council to release the part of the Guarantee as requested; or

(b) Notify the Contractor that it will recommend to the Council that the requested Guarantee should not be released, and specify the reasons why and the measures necessary to satisfy the requirements of the Closure Plan.

52. Where part of the Guarantee shall be released in accordance with paragraphs 50 and 51, the Commission shall make a recommendation to the Council in respect of the amount of the Guarantee that shall be repaid or released.

53. The Authority shall release any remaining part of the Guarantee to the Contractor when:

(a) The Contractor has failed to implement a Closure Plan; and

(b) The Contractor has failed to meet any costs in respect of any of the items listed in regulation 26 (2); and

(c) The Authority has implemented the Closure Plan and covered outstanding costs relating to the items listed in regulation 26 (2).

VII. Definitions

Except as otherwise specified herein, terms and phrases defined in the regulations on exploitation shall have the same meaning in the present standard.

Environmental Performance Guarantee Declaration means the declaration prescribed in section IV F of the standard.

Environmental Performance Guarantee Confirmation means the confirmation prescribed in section IV G of the standard.

EPG scope means the events listed in regulation 26 (2).

Group or Consortium means a partnership or consortium of entities that submit an application for approval of a Plan of Work.

Guarantee means the Environmental Performance Guarantee.

Guidelines on the form and calculation of an Environmental Performance Guarantee

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I. Scope

A. Purpose

1. Regulation 26 of the regulations on exploitation requires that a Contractor provide an Environmental Performance Guarantee (the “Guarantee”) in favour of the Authority to meet the likely costs, expenses and liabilities that may result from either:
 - (a) The premature closure of Exploitation activities;
 - (b) The decommissioning and final closure of Exploitation activities, including the removal of any Installations and equipment; and
 - (c) The post-closure monitoring and management of residual Environmental Effects (together, the “EPG scope”).
2. The present guidelines support the implementation of the standard and the regulations on exploitation.
3. Sections of the present guidelines should be read in conjunction with the equivalent sections of the standard.

B. Definitions

4. Except as otherwise specified herein, terms and phrases defined in the regulations on exploitation have the same meaning in the present guidelines.

II. Requirements under the regulations on exploitation relevant to the Environmental Performance Guarantee

Forms of the Environmental Performance Guarantee

5. An Applicant or Contractor may use its discretion to determine the form (or combination of forms) of its specific requirements under its Plan of Work and Closure Plan, provided that the form of the Guarantee:
 - (a) Covers 100 per cent of the total estimated cost required to satisfy regulation 26 (2);
 - (b) Is calculated and independently verified on a third-party cost basis; and
 - (c) Is immediately accessible by the Authority.
6. The following non-exhaustive forms of Guarantee, listed without prejudice to each form’s relative soundness and suitability, may be proposed by an Applicant or Contractor pursuant to regulation 26 (2).

Insurance policy or scheme

7. From the funds deposited, the insurer issues the required security bonds to the Authority and pays the actual costs of the items listed in regulation 26 (2). If, at the end of project life, there is a surplus in the account, it is remitted to the Contractor; if there is a deficit, the insurer pays.

Letter of credit/bank guarantee

8. An irrevocable letter of credit, also known as a bank guarantee, is an unconditional agreement between a bank and a proponent to provide funds to a third

party on demand. In this instance, the third party is the Authority and the proponent is the Contractor. A letter of credit or bank guarantee will include the terms and conditions of the agreement between the Contractor and the Authority, with reference to the Closure Plan and the agreed-upon costs to pay for the items listed in regulation 26 (2). Any changes to the letter of credit or bank guarantee require the consent of the issuing bank, the Applicant/Contractor and the Authority.

Insurance guarantee

9. An insurance guarantee or bond is an agreement between an insurance company and a Contractor to provide funds to a third party under certain circumstances. In this instance, the third party is the Authority. An insurance guarantee includes the terms and conditions of the agreement between the Contractor and the Authority with reference to the Closure Plan, agreed-upon costs and conditions for the release of the bond. Any changes to an insurance guarantee require the consent of all the parties involved.

Cash deposits

10. A deposit can be made for a financial guarantee such as cash, a bank draft or a certified cheque. The funds should be placed in a dedicated account under the management of the financial institution, with the Authority and Contractor holding joint signatory powers. Alternatively, the cash may be used to purchase a certificate of deposit, which may be pledged to the Authority as security.

Sinking fund

11. A sinking fund is a method of making incremental payments under a letter of credit, insurance guarantee or cash security. A schedule of payments is established when the financial guarantee is set up. In accordance with the schedule, the Contractor makes payments to the fund until the full amount of the financial guarantee has been reached.

III. How to demonstrate a sufficient Guarantee

A. An approved Guarantee is a condition for approval of a Plan of Work

12. Where the Applicant proposes a Guarantee under section IV A of the standard, the Commission may engage its own expert to assess and validate the Guarantee proposed by the Applicant; the costs incurred by the Commission in doing so would need to be included in the application fee payable by the Applicant when submitting a Plan of Work.

B. How to determine the form of the Guarantee

13. An Applicant or Contractor may select a variety of forms of guarantees that, in aggregate, are equal to the maximum Guarantee required in order to meet the requirements of regulation 26 (2).

14. An Applicant or Contractor may use its discretion to determine the form of the Guarantee or combination of forms to suit their specific requirements, provided that the form or combination of forms covers the maximum guarantee calculated in accordance with the Closure Plan and is independently validated.

C. How to calculate the Guarantee

15. The Commission does not endorse any single cost-estimation tool for calculating the Guarantee.

16. An Applicant or Contractor may use any robust cost-estimation tool, provided that it is suited to the Contractor's or Applicant's proposed operations and results in a calculation that is sufficient to cover the EPG scope.

17. If an Applicant has not yet obtained approval from the Commission under regulation 7 (4), the Applicant may (subject to para. 23 of the standard):

(a) Estimate the greatest reasonably credible costs, expenses and liabilities that may arise from all Closure Plans across all Plans of Work; and

(b) Produce one combined form and calculation of financial guarantee for consideration by the Commission.

D. Review process of a Guarantee proposal

18. The Commission may seek additional information from the Applicant in the event that it has any queries with respect to:

(a) The independent validator(s) statement;

(b) The form proposed by the Applicant; or

(c) The calculation of the estimated costs of the EPG scope.

IV. Definitions

Environmental Performance Guarantee Declaration means the declaration prescribed in section IV F of the standard.

Environmental Performance Guarantee Confirmation means the confirmation prescribed in section IV G of the standard.

EPG scope means the events listed in regulation 26 (2).

Guarantee means the Environmental Performance Guarantee.
