September 2025

THE PEW CHARITABLE TRUST'S COMMENTARY

ON THE REVISED CONSOLIDATED TEXT: DRAFT REGULATIONS ON EXPLOITATION OF MINERAL RESOURCES IN THE AREA, DATED 29 NOVEMBER 2024 (ISBA/30/C/CRP.1)

Key

Black font, red font, and grey text-boxes are replicated from the Draft Regulations text.

Blue font represents commentary or edits proposed by The Pew Charitable Trusts.

Regulation 26

Environmental Performance Guarantee

1. A Contractor shall lodge an Environmental Performance Guarantee in favour of the Authority [and no later than [30 Days before] the commencement date of Commercial P~~p~~roduction] / [on execution of the Exploitation Contract] in the Mining Area.

2. The required form and amount of the Environmental Performance Guarantee shall be [assessed and recommended by the Commission and] determined [by the Council] [at the time the Council approves the Plan of Work for Exploitation activities] according to the applicable Standards and take into consideration Guidelines, and shall reflect the forecasted costs required for [implementation of the Contractor's Closure Plan and Emergency Response and Contingency Plan.~~:~~

~~[(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.~~]

3. The amount of an Environmental Performance Guarantee may be provided by way of instalments over a specified period [or a Performance Security provided by the qualified commercial bank]. [In such cases, commercial production may only commence once the full amount has been provided.]

~~[3.bis. The Environmental Performance Guarantee shall take the form of a letter of credit or security bond guaranteed by a reputable financial institution and meet the financial criterias set out in the applicable Standard and take into consideration Guidelines.~~

4. The amount of the Environmental Performance Guarantee shall be reviewed and updated [every five years] :

(a) Where the Closure Plan is updated in accordance with these Regulations; or

(b) As the result of:

(i) A performance assessment under Regulation 52;

(ii) A modification of a Plan of Work under Regulation 57; or

(iii) A review of activities under a Plan of Work under Regulation 58;

~~[(iv) [After consultation with a Contractor,] the Authority considers that the likely cost of the activities outlined in (2) have substantially increased;] and~~

(c) At the time of review by the Commission of a Final Closure Plan under Regulation 60.

[(d) At least every [five] years to consider whether the likely cost of the activities outlined in paragraph 2 have substantially increased, taking into account i~~I~~nflation and other market or economic conditions that may impact on the amount of the Environmental Performance G~~g~~uarantee that must be held.]

[(e) At each extension of the Exploitation Contract;

(f) Any time that the Environmental Performance Guarantee, or any part of it, is used or drawn upon, and]

(g) Inflation and other market or economic conditions impact on the amount of the guarantee that must be held.

5. A Contractor shall, as a result of any review under paragraph 4 above, recalculate the amount of the Environmental Performance Guarantee within 60 Days of a review date and submit this calculation to the Secretary General for forwarding to the Commission for their review. [The Commission shall promptly assess and make appropriate recommendations to the Council, which shall determine the revised amount. Within 30 Days, the Contractor shall] lodge a revised guarantee in favour of the Authority.

6. The Authority shall hold such guarantee in accordance with its policies and procedures, which shall provide for:

(a) The repayment or release of any Environmental Performance Guarantee, or part thereof, upon compliance by the Contractor ~~of~~with its obligations that are the subject of the Environmental Performance Guarantee; or

(b) The forfeiture of any Environmental Performance Guarantee, or part thereof, where the Contractor fails to comply with such obligations.

[(c) The replenishment of any Environmental Performance Guarantee, or part thereof, by the Contractor should the Authority need to make recourse to the Environmental Performance Guarantee.]

7. The requirement for an Environmental Performance Guarantee under this Regulation shall be applied in a uniform and non-discriminatory manner.

8. ~~[The lodging of an Environmental Performance Guarantee does not relieve the Contractor of its obligations that are subject of this Regulation.] [Refusal or reluctance on the part of the Contractor to fulfil such obligation shall be subject to the relevant compliance measures under these Regulations~~]. The provision of an Environmental Performance Guarantee by a Contractor [shall not affect] [~~does not limit~~] the responsibility and liability of the Contractor under its Exploitation Contract [~~in the amount of such guarantee~~][and does not relieve the Contractor of its obligations that are subject of this Regulation]. ~~[Should the Authority be compelled to make recourse to the Environmental Performance Guarantee due to any non-compliance by the Contractor of its obligations that are the subject of the Environmental Performance Guarantee, the Contractor remains liable to the Authority for any direct, incidental or additional costs incurred by the Authority.]~~

The principal concerns for the Council with DR26 should be (i) **ensuring the EPG is timely and adequate** to cover the scope that the Council agrees upon, and (ii) **ensuring the EPG mechanism does not fail** in practice e.g. due to an EPG being from an unreliable source, or self-certified by a Contractor or entity that is insolvent or dissolved. It currently seems like point (ii) will be covered by Standards, and we would like to see that in place, before DR26 is settled to ensure that the requirements for a sufficient and robust EPG are legally binding.

Comments

- One regional group has suggested that the guarantee is renamed to a "D*ecommissioning Bond*", and that policy discussions are needed in respect of whether it should be a financial instrument or a fund.

If the Council has now agreed that the EPG will apply only to Closure (and emergency response) obligations, as we infer is the case, then we agree that a name change would be appropriate. We would suggest as an alternative **'Closure Guarantee'**. This is because 'Closure' and 'Decommissioning' are defined terms, with Decommissioning being one stage within Closure, but not comprising all of the Closure commitments that the EPG should cover. So, the relevant term for the purpose of the EPG is 'Closure'. We also understand that 'bond' has a particular meaning in some industries and jurisdictions that is more limited than the general term 'guarantee'. We would also note that, if the Council has now agreed that the EPG will apply only to Closure (and emergency response), the Regulations do not provide for a financial guarantee in the event of financial liability incurred by pre-production site surveys, test mining, or production itself. As such an absence of guarantee could cause financial liability for the ISA, we wonder if the Council may wish to invite comment from the Finance Committee on whether it is sufficient for the EPG to cover only Closure.

- In paragraph 1, several delegations have suggested to refer to the date of the execution of the Exploitation Contract rather than the commencement of Commercial Production. Both alternatives have thus been inserted and placed in square brackets. Delegations are encouraged to settle on one of the alternatives.

Choosing the date of commencement of Commercial Production as the date of payment or establishment of an EPG implies that there are no circumstances in which a Contractor could incur Closure or emergency response costs before Commercial Production. However, there may be scenarios in which a Contractor obtains an Exploitation Contract, carries out initial work (e.g. Test Mining or even production and extraction which the Contractor may argue is not yet robust enough to be defined as Commercial Production) and never moves to Commercial Production because of circumstances unique to the Contractor or because of changing market conditions which make Commercial Production unprofitable. Such scenarios would require Closure and have the potential to incur Emergency Response costs. If the Council can foresee such a situation, then the date of payment or establishment of the EPG should be the date of Contract execution.

- In paragraph 2, it has been suggested to specify that the Environmental Performance Guarantee ("EPG") must be in place at the time the Council approves the Plan of Work for Exploitation, this in order to ensure that the conditions of the EPG are clear at the outset and incorporated into the Plan of Work. Furthermore, it has been suggested that the sub-paragraphs of paragraph 2 be replaced with a reference to the implementation of the Contractor's Closure Plan.

We agree that the **terms of the EPG need to be agreed at the time of Contract award** and incorporated into the Plan of Work. This is already covered in DR7 (on the content of applications) and DR13 (on the evaluation of applications). So, the wording of **paragraph (2)** could be simplified thus:

> The required form and amount of the Environmental Performance Guarantee shall be included in the Plan of Work, ~~[assessed and recommended by the Commission and] determined [by the Council] [at the time the Council approves the Plan of Work for Exploitation activities]~~ according to the applicable Standards and take into consideration Guidelines, and shall reflect the forecasted costs required for [implementation of the Contractor's Closure Plan and Emergency Response and Contingency Plan.~~:~~

Whether or not DR26 requires the EPG to be lodged (as opposed to being agreed in principle) at the time of Contract execution, depends on the Council's risk assessment (as identified in our preceding comment).

If the Council, potentially considering the advice of the Finance Committee, is comfortable with the absence of a financial guarantee in the event of financial liability incurred by pre-production site surveys, test mining, or production itself, than the proposed addition to the end of paragraph (2) works.

In relation to **paragraph (3)** regarding payment of an EPG by instalments, we recall a Council member requesting its deletion during the 29th session. We also support deletion. DR25 should specify the date by which the EPG must have been lodged. There seems no need for additional detail in the regulations as to when or how this is done prior to that date. The Standard could cover it, if parties find it necessary. If retained, the term 'Commercial Production' should be capitalised in paragraph (3).

- Paragraph 3 bis. was suggested deleted in the previous version of the Consolidated Text. No delegations objected to the deletion, but it has been placed in the Revised Suspense Document for the time being.

Former paragraph (3)(bis) specifies **minimum requirements for the credit rating** of a financial institution backing the EPG. It is now in the Suspense Document. If (3 bis) is not included in DR26, then we urge that it must be placed in a Standard, not a Guideline - as it is a critical aspect of the EPG regime, intended to be legally binding.

- It has been suggested to reinsert regulation on inflation in paragraph 4.

We agree with the need to include the wording in **paragraph (4)(d)** with regards to inflation, and the purpose of a review being to assess the adequacy of the EPG. However ,we think these points concern what needs to be taken into account in a review, not what triggers it. As such they are relevant for *any* review of the EPG howsoever triggered, so would be better placed in paragraph (5). Including a 5-year trigger in (d), is unnecessary because sub-paragraph (4)(b)(i) makes a performance assessment under DR52 a trigger for EPG review, and such performance assessments are required at least every 5 years in any event in the current drafting of DR52.

Paragraph (5)'s square bracketed text is important to retain (though the reference to 'guarantee' should be changed to 'Environmental Performance Guarantee'. The ISA should be in the driving seat to recalculate and approve the EPG on review, not just the Contractor. We also wondered: (i) whether the Finance Committee should play a role here (in collaboration with the LTC), given that an inadequate EPG could cause financial liability for the ISA? And (ii) whether a change of an EPG is not a 'Material Change' to the Plan of Work? In which case DR57 can be invoked instead of creating a new separate process in paragraph (4) for the LTC and the Council only for EPG change.

- For paragraph 6, it has been suggested that it should also cover replenishment by the Contractor in cases where the EPG is diminished.

We support this addition to **paragraph (6)**.

Paragraph (7) is redundant and should be deleted, as DR2(4)(a)(quat) applies the principle of **uniform and non-discriminatory** manner generally to all the regulations. Singling out individual regulations as being applied in a uniform and non-discriminatory manner, implies others are not.

- In paragraph 8, it has been suggested by a delegation to retain the second sentence to clarify the available compliance measures under the Regulations.

Paragraph (8) seems clear as drafted (with deletions). Though we think the last line should read 'and does not relieve the Contractor of its obligations <u>under these Regulations</u>" (not "that are subject of this Regulation"). This would include, for example, the obligation to maintain insurance.

Finally, DR26 does not appear **harmonised with DR24 ('Change of Control')**. We suggest that DR26 should contain a cross-reference to DR24's treatment of change of control of the EPG-provided e.g. a requirement for notification and assurance as to the EPG's continued compliance with the ISA's requirements. We recall Council members also, during the July 2024 session, requesting better linkage between DR26 and DRs59-61 (pertaining to Closure).