

Financial Assurance for Metals Operations

Summary Paper

Environmental financial assurance (EFA) is increasingly required for all kinds of industrial operations around the world, including metals operations. ICMM commissioned this study in order to have a better understanding of the assurance requirements for metals operations¹. This summary paper outlines the findings from the study. It covers common issues with current EFA requirements for metals operations in different jurisdictions around the world as well as recommendations to address them.

Introduction

This study² was carried out to complement a 2005 ICMM report which dealt with EFA requirements for mine closure and reclamation³. It is based on a survey of ICMM members, regulatory bodies and investment community representatives. The assessment covered 19 countries—11 in Europe, plus Australia, Brazil, Canada, Chile, China, Japan, South Africa and the United States. These countries were chosen based on the regional distribution of the operations of ICMM member metals companies and associations.

Overview of financial assurance requirements

Governments require EFA to ensure that funds are available to cover environmental liabilities. For metal companies, financial assurance is generally requested to cover the environmental risks associated to waste disposal, waste transport, waste treatment and closure and post-closure liabilities. All types of EFA instruments are used. Table 2 at the end of this report provides a summary of EFA requirements in the countries surveyed.

Most legislation allows regulatory agencies to decide on EFA requirements on a case-by-case basis. However, the survey found that regulators tend to maintain a conservative approach and require 'hard' forms

¹ For the purposes of this report, the metals sector includes smelting and refining; metal products and materials production operations are included only when they are on the same site as smelting and refining processes.

² Based on work carried out by Environmental Resources Management, Belgium

³ Study carried out by George Miller.

of financial assurance which involve direct carrying costs for companies. The most frequently required types of EFA instruments include letters of credit, bonds, cash and certificates of deposit. These 'hard' instruments can have significant financial impacts on companies. The use of 'soft' financial assurance options, such as self-insurance, provisions or guarantees from the parent corporation, is not frequently an option

Issues in the use of financial assurance

The survey highlighted a number of issues with financial assurance requirements, many of which are similar to the issues described for the mining sector in the 2005 ICMM report.

Consideration of an operation's characteristics

The level of environmental risk associated to individual operations can differ widely depending on a number of factors. A lower level of risk should be reflected in the form and amount of financial assurance required.

The survey found that some significant factors which reduce the level of risk are commonly not taken into account when deciding on EFA requirements. This is illustrated by the use of codes or rubrics in some jurisdictions to determine EFA requirements based on type of activity, volumes handled or other values which are easy to define. Such codes do not typically take into consideration any of the characteristics of an operation which influence the level of associated environmental risk.

In most cases, financial assurance requirements do not take the financial strength of a company into account. If the company is sufficiently strong in financial terms, and if the project represents only a limited financial requirement, 'soft' financial assurance instruments or even finite EFA commitments should be considered. Although regulators may not always have the tools available to generically evaluate an applicant's financial strength, mechanisms to include this in individual negotiation processes should be developed.

EFA regulation also rarely includes consideration of the way operations handle risks by looking at a company's track record or risk management practices. Regulators should take into account the effective risk profile of companies and acknowledge historical performance and risk and environmental management practices.

Recycling waste

The survey found that in some cases financial assurance requirements are imposed on secondary raw materials because they are classified as wastes. This includes materials such as (non-ferrous) scrap and filter cakes from wastewater treatment processes containing gold or palladium cyanide sludge as well as other waste streams which are recycled or reused as inputs into other processes.

In these cases, the imposition of EFA requirements, particularly 'hard' instruments which are meant to provide high levels of assurance, can be inappropriate. For example, one survey respondent indicated that EFAs are requested for recycled material being transferred from one country to another within the same company. Although it is expected that both waste and secondary raw materials should be fully traceable, EFA requirements should not constitute disincentives for recycling.

Taxation

Hard forms of EFA impose costs on the operator. Tax regimes need to recognise these costs and attempt to minimise their negative effects and provide incentives for good behaviour. It is therefore essential that the direct carrying cost of all EFA instruments be deductible for tax purposes. Moreover, in the case of deposits of cash or securities, the earnings from these funds should be sheltered from tax.

Closure and post-closure obligations

Forecasting costs for remedial actions and post-closure obligations is a complex exercise. The level of cleanup for remediation and brown-field initiatives can be compromised by a lack of clarity in standards.

Regulators should clearly define the standard of reclamation and include consideration of the future land use at the site when doing so. Once these requirements are established, uncertainties with respect to financial resources and potential liabilities should be made clear and kept to a minimum.

In some jurisdictions legislation on future liabilities can result in sites that have adhered to the standards current at the time of closure being held retrospectively liable according to future requirements. This typically results in large cleanup and legal costs that are difficult to define with any precision. Financial assurance instruments are often used to cover these costs and, in some cases, financial assurance is required to cover long-term costs.

Asking operations to be accountable to undefined future standards essentially creates a framework with 'changing goal posts' that many would argue is unworkable. Legislation should provide that at a certain moment the company can be relieved of future liabilities. This should occur at a defined time after a company has fulfilled its obligations and achieved agreed clean-up standards. The timeframe and criteria should be established as early as possible, with any changes incorporated according to a pre-defined process.

Insurance instruments

Insurance is a commonly used 'soft' form of financial assurance. Many governments request that they be named sole beneficiary of insurance instruments, which some observers argue represents a conflict of interest because of government's role as regulator.

Another issue with insurance relates to the lack of harmonization between fiscal, environmental and insurance law. For example, the survey found that in some jurisdictions there were differences between pieces of legislation about what can and cannot be covered under an insurance policy and differences in premium tax regimes. In order to avoid confusion, different legislative frameworks within a jurisdiction should concur.

Recommendations

As outlined in the 2005 ICMM report, there is a need to ensure that EFA is applied based on the principle of efficiency: EFAs should be effective in ensuring that all necessary and reasonable measures to protect the environment are taken and also the least costly of all the effective instruments.

The following table summarizes the recommendations discussed in this report aimed at addressing the issues relating to financial assurance for metals operations.

Table 1 Summary of EFA issues and recommendations

Issue	Recommendation
Financial strength	Regulatory authorities should take the financial strength of a company into account. If the company is sufficiently strong in financial terms, and if the project represents only a limited financial requirement, 'soft' EFA tools or even finite commitments should be considered.
Track record	Regulators should take into account the effective risk profile of companies and acknowledge historical performance and environmental management.
Risk management practices	The implementation of risk management practices should provide regulators with a higher level of certainty that risks are being addressed. Regulators should consider the effectiveness of company risk management practices when deciding on EFA requirements.

Issue	Recommendation
Recycling waste	In many cases, materials which are recycled or reused are simply classified as wastes and must comply with relevant EFA requirements. The actual level of environmental risk with these materials and associated need for financial assurance should be considered carefully in an effort to avoid inhibiting recycling.
Taxation	Tax regimes should recognise EFA costs and attempt to minimise their negative effects. The direct carrying cost of all EFA instruments be deductible for tax purposes and the earnings from cash deposits or securities should be sheltered from tax.
Clean-up standards	Cleanup standards and potential liabilities should be clearly established at an early stage.
Post-closure obligation	Relief from potential liabilities that might arise in the future should be provided once a company has clearly fulfilled its obligations and achieved agreed clean-up standards. The timeframe and criteria should be established as early as possible, with any changes incorporated according to a pre-defined process.
Insurance instruments	When using insurance instruments, the beneficiary should be identified so as to avoid conflicts of interest (e.g., the sole beneficiary should not also be the regulator). In addition, there should be harmonization between relevant fiscal, environmental and insurance law.
Financial risks and costs of EFAs	Regulators should take into account the efficiency of the EFA requested in relation to its financial risks and costs.

Table 2 EFA Requirements in 19 Jurisdictions

Country	When EFAs are requested	Type of EFAs accepted	Regulators	Comments
Australia	Currently none	-	EPA	Possible EFA requirements for waste disposal activities and contaminated sites.
Belgium	Waste transport, waste treatment, waste disposal, transaction of contaminated site, site closure	LOC, bond, mortgage, cash deposit, certificate of deposit, insurance	OVAM (BIM) Région Wallonne	OVAM tends to request cash deposit. Legislation in Brussels and the Walloon Region is developing.
Brazil	Currently none	-	Different states	Possible developments of EFA requirements for potentially polluting activities.
Bulgaria	Currently none	-	-	As a candidate EU Member State, Bulgaria will have to comply with the various related EU Directives.
Canada	Permit application, site closure, site transaction, waste treatment, and waste disposal.	LOC, bond, cash deposits, insurance, provisions, cash trust funds	Different provinces (mainly Québec and Ontario)	
Chile	Currently none	-	-	
China	Currently none	-	-	
Finland	Permit application, waste transport	Compulsory insurance, LOC	Finnish Ministry of Environment	
France	Waste treatment, waste transport, Seveso activities	LOC, bond, cash deposit, certificate of deposit, cash	Préfectures and DRIRES	Loi Bachelot: EFAs may be requested in the future for site closure.
Germany	Waste transport, waste treatment facilities, waste disposals, facilities falling under the legislation of the 'Störfall Verordnung' (Seveso)	LOC, bond, cash deposit, certificate of deposit, cash – specific liability insurance (Seveso)	Different States	New initiatives expected within the European environmental liability Directive – New 'Umweltschadengesetz' (post-closure liabilities).
Italy	Permit application, site closure, waste disposal, waste transport	LOC, bonds, cash deposit, certificate of deposit (transport) – specific insurance (Pool Inquinamento or private insurers)	Local environmental public authorities – requests differ from region to region – most stringent region is Veneto.	EFAs are requested by authorities for metals refining and surface treatment even though there is currently no legal framework. This is expected to be developed within the scope of the European Directive on environmental liability, with EGA requirements formalized.
Japan	Currently none	-	-	No expected change in the short term.
Netherlands	Waste transport, waste disposals Permit application/renewal for Specific activities listed in the 'Wet Financiering Zekerheid (Financial Assurance Law)'	Provisions, insurance, LOC, bonds, cash deposits, certificate of insurance	Provinces and communities	Increasing pressure to request EFA for operations with high operational risks and low financial capacity. The law may undergo some fine-tuning in the future.
Poland	Currently none	-	-	As an EU Member State, Poland will have to comply with EU Directives on waste, trans-boundary waste and environmental liability.

Country	When EFAs are requested	Type of EFAs accepted	Regulators	Comments
South Africa	Only required when Metals Operations are part of a mining facility	Cash deposit, trust fund, LOC, balance test (provisions)	Department of Minerals and Energy	Possible broadening of EFA requirements to waste disposal activities and contaminated sites.
Spain	Waste disposal, waste treatment and waste transport	Insurance policies, LOC	Local regulators under impulse of the Federal Government	European Directive on environmental liability will be transposed to the Spanish legislation (no later than 30 September 2007) and will probably include EFAs, including post-closure obligations.
Sweden	Waste disposal, waste treatment, waste transport, certain operations listed in the local legislation	Compulsory insurance 'Miljöskade och saneringsförsäkringen'; LOC's, bonds, cash deposits, certificate of deposit	Swedish EPA (Naturvårdsverket)	Current legislative scope will become more stringent under the European Directive on environmental liability.
United Kingdom	Waste disposal, waste treatment, waste transport	LOC or deposit	Environmental agency can request EFA	Initiatives on the European Directive on environmental liability are expected in 2007. EFAs for post-closure obligations may be developed.
United States	Site closure, waste disposal, waste treatment, waste transport	LOC, bond, cash deposits, insurance, provisions, cash trust funds	Different state EPAs	The EPA may require EFA for predicted impacts to air, water or waste. States may also use EFA in areas where they have primacy.