Guidance on the Use of Financial Assurances, and Suggested Language for Conditions for NOAA Fisheries' Gulf Aquaculture Permits

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Purpose and applicability

a) Purpose. NOAA Fisheries has the authority to issue Gulf Aquaculture Permits (GAPs) under the Fishery Management Plan for Regulating Offshore Marine Aquaculture in the Gulf of Mexico (FMP) and regulations implementing the amendment codified at 50 CFR § 622, Subpart F . These permits require a GAP applicant to post an assurance bond, also called a surety bond, sufficient to cover costs associated with removal of all components of the aquaculture facility, including cultured animals, thereby diminishing long-term impacts that could result from structures and cultured animals remaining in the environment. The purpose of this document is to provide required guidance on the use of surety bonds to ensure the removal of all components of the aquaculture facility, including cultured animals.

b) Applicability. This guidance applies to GAPs issued by NOAA Fisheries under the FMP and regulations. As part of the GAP application package, the FMP and regulations require documentation certifying the applicant has posted an assurance bond sufficient to remove of all components of the aquaculture facility, including cultured animals. The assurance bond would cover the costs of removing animals with World Organization of Animal Health reportable pathogens, animals with pathogens identified as reportable pathogens in the National Aquatic Animal Health Plan, and genetically engineered or transgenic animals if a permittee does not remove these animals upon order by NOAA Fisheries. The assurance bond will also cover removal of all components of the aquaculture facility, including cultured animals if there are any other violations of the permit conditions or regulations.

The assurance bond would not be required to cover the costs of removing an oil and gas platform. The assurance bond would not be required to cover the costs of environmental damages. Failure to abide by the assurance bond requirements may result in suspension or revocation of a GAP.

Specific Considerations for Use of Assurance Bonds

a) The Purpose of Requiring Financial Assurances. An assurance bond is a guarantee by a surety company that certain specified obligations will be fulfilled. If the permittee fails to pay for the removal of all components of the aquaculture facility, including cultured animals, from the permitted site, the surety company agrees to ensure compliance with the GAP if the NOAA Fisheries Regional Administrator (RA) determines the permittee has defaulted and is liable for removal costs.

b) Legal Considerations. Unlike some other Federal agencies, NOAA Fisheries lacks statutory authority to accept directly, retain, and draw upon surety bonds to ensure compliance with permit conditions. If NOAA Fisheries were to receive the sum of a surety bond directly, the sum would be categorized as a "miscellaneous receipt" under the Miscellaneous Receipts Statute, 31 U.S.C. §3302(b), and would be deposited in the U.S. Treasury without being used to ensure permit compliance. However, along with its authority to deny permit authorizations, NOAA Fisheries has the authority to issue its permits with conditions.

NOAA Fisheries will not accept directly, retain, or draw on financial assurance funds, including receipt or management of financial assurances, in the event of default of the permittee as long as NOAA Fisheries is not positioned to accept directly, retain, or draw upon bond monies in the event of a default. As is required in the FMP, NOAA Fisheries will condition the approval of a permit to require the posting and execution of a surety bond by a permittee.

Bonds should be executed with the signatures of an additional governmental or non-governmental entity or entities as a bond "surety" who agree to ensure performance if NOAA Fisheries should determine that the permittee, as the bond "principal," has defaulted on any of its responsibilities. The permit should also specify that NOAA Fisheries stands as a third-party "obligee" to the principal and surety(ies) of the bond, possessing the full and final authority to determine the penal sum amount, and to determine whether the principal and the surety(ies) have specifically performed some or all of the obligations, covenants, terms, conditions, and agreements of the bond. Finally, the bond should specify that if both the principal and the surety(ies) default in their responsibilities, NOAA Fisheries retains the full and final discretionary authority to identify new parties as additional surety(ies) to the bond.

c) Requirement to Provide Proof of Financial Assurance. As part of the GAP application package, documentation must be provided which certifies that the applicant has secured a financial assurance bond. The permittee must also establish a standby trust fund into which any payments made by the surety company can be deposited. The trustee may not be the same entity as the permittee.

d) Allowable Types of Financial Assurances. NOAA Fisheries will accept two types of assurance bonds for GAPs issued under the FMP. These are:

1) Performance bond. A performance bond guarantees that the permittee will perform the final closure in accordance with the requirements of their GAP. Performance bonds can also be paid into a standby trust fund.

2) Payment bond. A payment bond will, in the event a permittee fails to pay, fund a standby trust fund in the amount equal to the value (penal sum) of the bond. The trustee is then responsible for ensuring the funds are used for the removal.

NOAA Fisheries will not accept other types of financial assurances including irrevocable trusts, escrow accounts, casualty insurance, letters of credit, legislatively enacted dedicated funds for government-operated banks or other approved instruments.

e) Amount of Financial Assurance. The dollar amount of the financial assurance, including the penal sum of a performance bond, must be approved by NOAA Fisheries. The approved amount (including annual adjustments for inflation) will be included as a condition in the GAP. Any required financial assurances should be sufficient to cover contingency actions such as default by the permittee or failure to meet standards outlined in their GAP. In addition, the amount of the financial assurances should be based on the estimated amount required to remove all of components of the aquaculture facility, including cultured animals. The amount should be adjusted annually for inflation, throughout the lifetime of the permit. The estimate must equal the cost of removing all components of the facility, including cultured animals, and take into consideration the size, complexity, location and other relevant factors of the permitted facility. The financial assurances may also include a reasonable amount to cover contingency costs or other amount determined to be appropriate to the level of the uncertainty for completion of a successful removal. NOAA Fisheries will document the analysis used to determine the amount of the financial assurance, and will include this analysis in the administrative records for their permits.

In order for NOAA Fisheries to determine whether the dollar amount of the assurance bond is sufficient, the permittee shall submit to NOAA Fisheries a detailed written estimate, in current dollars, of the cost of removing all components of the facility, including cultured animals. The estimate should be based on the costs to the permittee of hiring a third party to conduct the removal. A third party is a party who is neither a parent nor a subsidiary of the permittee. The permittee should not incorporate any salvage value that may be realized with the sale of any component of the facility into the estimate. The permittee should adjust on an annual basis the cost of removal for inflation. The permittee should submit the adjusted estimate to NOAA Fisheries within 30 days prior to the anniversary date of the permit issuance to allow time for the agency to review and approve the adjustments.

f) Use and Release of Financial Assurances. If, upon order by NOAA Fisheries, a permittee does not remove all components of the facility, including cultured animals, the RA will, at his discretion, direct the assurance bond to be paid to a designee or to a standby trust. The designee or trustee will be directed by the RA to perform the removal. When a standby trust is used, all amounts paid by the assurance bond provider will be deposited directly into the standby trust fund for distribution by the trustee in accordance with the RA's instructions. If the bond is paid into the standby trust, the RA will direct the trustee to use the trust fund to perform the removal. The trustee may not be the same entity as the permittee.

g) Incapacity of permittees, guarantors, or financial institutions. A permittee should notify the RA by certified mail of the commencement of a voluntary or involuntary proceeding under Title 11 (Bankruptcy), U.S. Code, naming the owner or operator as debtor, within 10 days after commencement of the proceeding. A permittee will be deemed to be without the required financial assurance in the event of bankruptcy of the trustee or issuing institution, or a suspension or revocation of the authority of the trustee institution to act as trustee or of the institution issuing the surety bond. The owner or operator must establish other financial assurance or liability coverage within 60 days after such an event or their GAP may be revoked.

h) Suggested Permit Language. The following is suggested language for a GAP condition involving an assurance bond:

> *"The Permittee has executed a [Performance/Payment] Bond dated [insert date bond executed] in the amount of [insert amount determined by NOAA Fisheries], attached to this permit as [insert Attachment Number or Letter] and made a part hereof, to provide financial assurance for the performance of all of the obligations, covenants, terms, conditions, and agreements required of the Permittee under this permit. The bond shall be posted before any components of the facility authorized by this permit are placed on the site authorized by this permit."*

i) Model Performance Bond. Appendix A is a Model Performance Bond which is provided as a suggested template for the NOAA Fisheries assurance bond requirement. This Model Performance Bond may be modified at NOAA Fisheries' discretion.

<u>Duration.</u> This guidance remains effective unless revised or rescinded.

Appendix A: Model Performance Bond

Date bond executed:____________________

Effective date:____________________

Principal: [legal name and business address of owner or operator]

Type of organization: [insert "individual," "joint venture," "partnership," or "corporation"]

State of incorporation:____________________

Surety(ies): [name(s) and business address(es)]____________________

NMFS Identification Number, name, address, and closure and/or post-closure amount(s) for each facility guaranteed by this bond [indicate closure and post-closure amounts separately]: _________

Total penal sum of bond: $____________________

Surety's bond number:____________________

Know All Persons By These Presents, That we, the Principal and Surety(ies) hereto are firmly bound to the National Marine Fisheries Service (hereinafter called NMFS), in the above penal sum for the payment of which we bind ourselves, our heirs, executors, administrators, successors, and assigns jointly and severally; provided that, where the Surety(ies) are corporations acting as co-sureties, we, the Sureties, bind ourselves in such sum "jointly and severally" only for the purpose of allowing a joint action or actions against any or all of us, and for all other purposes each Surety binds itself, jointly and severally with the Principal, for the payment of such sum only as is set forth opposite the name of such Surety, but if no limit of liability is indicated, the limit of liability shall be the full amount of the penal sum.

Whereas said Principal is required, under the Fishery Management Plan for Regulating Offshore Marine Aquaculture in the Gulf of Mexico and its implementing regulations, to have a permit in order to own or operate each aquaculture facility identified above, and

Whereas said Principal is required to provide financial assurance for removal of all components of the aquaculture facility, including cultured animals, as a condition of the permit, and

Whereas said Principal shall establish a standby trust fund as is required when a surety bond is used to provide such financial assurance;

Now, Therefore, the conditions of this obligation are such that if the Principal shall faithfully perform removal, whenever required to do so, of each facility, and cultured animals, for which this bond guarantees removal, in accordance with the other requirements of the permit as such permit may be amended, pursuant to all applicable laws, statutes, rules, and regulations, as such laws, statutes, rules, and regulations may be amended,

The Surety(ies) shall become liable on this bond obligation only when the Principal has failed to fulfill the conditions described above.

Upon notification by the NMFS Regional Administrator that the Principal has been found in violation of the permit, for a facility for which this bond guarantees performance of removal, the Surety(ies) shall either perform removal in accordance with the permit requirements or place the removal amount guaranteed for the facility into the standby trust fund as directed by the NMFS Regional Administrator.

The Surety(ies) hereby waive(s) notification of amendments to permits, applicable laws, statutes, rules, and regulations and agrees that no such amendment shall in any way alleviate its (their) obligation on this bond.

The liability of the Surety(ies) shall not be discharged by any payment or succession of payments hereunder, unless and until such payment or payments shall amount in the aggregate to the penal sum of the bond, but in no event shall the obligation of the Surety(ies) hereunder exceed the amount of said penal sum.

The Surety(ies) may cancel the bond by sending notice of cancellation by certified mail to the owner or operator and to the NMFS Regional Administrator, provided, however, that cancellation shall not occur during the 120 days beginning on the date of receipt of the notice of cancellation by both the Principal and the NMFS Regional Administrator, as evidenced by the return receipts.

The principal may terminate this bond by sending written notice to the Surety(ies), provided, however, that no such notice shall become effective until the Surety(ies) receive(s) written authorization for termination of the bond by the NFMS Regional Administrator.

Principal and Surety(ies) hereby agree to adjust the penal sum of the bond yearly so that it guarantees a new removal amount and no decrease in the penal sum takes place without the written permission of the NMFS Regional Administrator.

In Witness Whereof, The Principal and Surety(ies) have executed this Performance Bond and have affixed their seals on the date set forth above.

The persons whose signatures appear below hereby certify that they are authorized to execute this surety bond on behalf of the Principal and Surety(ies) and that the wording of this surety bond is identical to the wording specified in 40 CFR 264.151(c) as such regulation was constituted on the date this bond was executed.

Principal

[Signature(s)]

[Name(s)]

[Title(s)]

[Corporate seal]

Corporate Surety(ies)

[Name and address]

State of incorporation:____________________

Liability limit: $____________________

[Signature(s)]

[Name(s) and title(s)]

[Corporate seal]

[For every co-surety, provide signature(s), corporate seal, and other information in the same manner as for Surety above.]

Bond premium: $____________________

-----END OF GUIDANCE DOCUMENT----