

ECONOMIC INSTRUMENTS IN ENVIRONMENTAL LICENSING: THE AUTONOMOUS BANK GUARANTEE FORESEEN IN CONAMA RESOLUTION 001/2019 (NITERÓI, RJ)

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ABSTRACT

The variety of products coming from the oil and gas industry, as well as their economic and social importance, makes the extractive activity essential to the Brazilian economy. However, the operation of the sector generates recurrent records of environmental accidents and many cause significant damage to ecosystems and local communities. Even though Brazil has robust environmental legislation, the need for new tools to protect the environment is evident. Considering the problem, this paper aims to address an alternative financial instrument linked to environmental licensing: the Autonomous Bank Guarantee (GBA) at first request. To this end, it is presented first an analysis of the methods of environmental protection in force in legislation and then the regulation that deals with the GBA in the Marine Extractive Reserve of Itaipu - RESEX Itaipu, in the municipality of Niterói, Rio de Janeiro, applied to the operation of the oil and gas industry. Throughout the work it becomes clear that, although the importance of this economic instrument and its advantages are evident, there is a need for further study on the subject, since there are obstacles to its greater application, both in terms of its operation and its legal application.

Keywords: Environment; Bank Guarantee; Insurance; Prevention; Damage.

1. INTRODUCTION

The oil and gas industry, responsible for extracting resources of high energy value and various applications for human daily life, has developed and intensified in Brazil. Oil serves several economic sectors, and is the raw material for fuels and several products of daily use in modern life. It is also related to non-energy sources, such as asphalt, paints, solvents, plastics, fertilizers, and shampoos, among others.

The enactment of Law No. 2,004/1953 (Brazil, 1953) and, consequently, the founding of Petrobras, the first company authorized to explore, produce, and refine oil in Brazil, created an economic milestone in the country. The beginning of the oil activity and the subsequent opening of the monopoly in oil exploration and production in 1997, led to gains with royalties, development in the other industries that are impacted by oil and a large generation of jobs and investment in research. According to the Brazilian Institute of Oil, Gas, and Biofuels (2019), the oil and gas industry ranks third in the ranking of the main Brazilian economic activities, corresponding to the same participation as livestock. And, according to the National Petroleum Agency (2018), the participation of the activity in the Brazilian GDP corresponds to 13%.

Thus, the importance of the oil and gas industry is evident in the country's reality. It is estimated that its relevance will remain in the coming years, given that Brazil has extensive reserves of this natural resource, and in a study published by the Brazilian Institute of Oil, Gas, and Biofuels (2019), only 7% of the areas in the Brazilian sedimentary basins are under concession, regardless of the type of contract.

Considering the prosperous future for the industry, one must also ponder over the negative environmental impacts generated. According to the National Petroleum Agency (2019), in the period from 2013 to 2018, 21,728 incidents related to the operation of the oil and gas industry were recorded. Among them, 816 caused damage to the environment, such as major discharges of oil and produced water, classified as severe; and 184 cases of risk of environmental damage.

Moreover, in the case of the state of Rio de Janeiro, it is imperative to highlight the history of disasters: the leak of 6,000 tons of oil into Guanabara Bay by a cargo ship chartered by Petrobras in March 1975; the leak of 2.8 million liters of fuel oil into mangroves in Rio de Janeiro in March 1997; the leak of 1.3 million liters of fuel oil from a ruptured pipeline in Guanabara Bay in January 2000; and the leak of 588,000 liters of oil by the American Chevron in the Campos basin in November 2011. All of these accidents have caused significant, some even irreparable, impacts to different types of ecosystems.

In the contrast between the importance of economic development and the risk of environmental damage from exploratory activities, it is necessary to apply environmental laws, especially the instruments of the National Environmental Policy, Law No. 6938/1981 (Brazil, 1981). Exceptionally, there is interest in the present work on licensing and environmental impact assessment, in addition to economic instruments, as ways of preventing and mitigating environmental damage in exploratory activities.

Therefore, this research aims to discuss economic instruments in the environmental licensing of activities with significant negative environmental impacts, in particular, the autonomous bank guarantee, present in COMAN Resolution 001/2019 (Niterói, 2019a) in force for the municipality of Niterói, RJ.

2. METHOD

The methodology applied sought two main sources of data: the Brazilian regulatory framework and bibliographic material on environmental licensing and economic instruments aimed at preventing environmental damage. The search occurred until October 2020. On the normative issue, regarding environmental licensing, the study started through the federal sphere, through Article 225 of the Federal Constitution (Brazil, 1988), which establishes the fundamental right of an ecologically balanced environment for all. Moreover, it focused on Article 23 of the Federal Constitution (Brazil, 1988), which establishes the common responsibility between the Union, States, and Municipalities to protect the environment, which is regulated, in part, in the Complementary Law No. 140 (Brazil, 2011), which establishes the competencies of the federal, state, and municipal spheres regarding environmental protection.

Furthermore, there is also a focus on Article 24 of the Federal Constitution (Brazil, 1988), which establishes the legislative powers between the Union, States, and Federal District, and on Article 30 of the same legal diploma, which defines the responsibilities attributed to the municipalities.

This study analyzed Law No. 6.938/1981 (Brazil, 1981), which provides for the National Environmental Policy, establishing environmental licensing as an instrument; as well as CONAMA Resolution No. 01/1986 (Ministry of the Environment, 1986), which determines the guidelines for environmental impact assessment, such as the application and content of environmental impact studies and reports.

About environmental licensing for activities in the oil and gas sector, which is the focus of Resolution COMAN No. 001/2019, the Petroleum Law, No. 9,478/1997 (Brazil, 1997) was taken as a basis; the specific legislations for environmental licensing for the oil and gas industry and related ones, such as: MMA Ordinance No. 422/2011 (Ministry of the Environment, 2011) and MME/MMA Inter-ministerial Ordinance No. 198/2011 (Ministry of the Environment and Ministry of Mines and Energy, 2011). In addition, a search was made for data and information provided on the website of the National Petroleum Agency (“Agência Nacional de Petróleo” - ANP). Resolution CNPE (National Council for Energy Research) No. 17/2017 (National Petroleum Agency, 2017) was also searched, which defines the guidelines for holding bids for exploratory blocks or areas with discoveries already characterized.

Regarding the Itaipu Marine Extractive Reserve - RESEX Itaipu, the study site of this paper, the normative basis was established through Law No. 9,985/2000 (Brazil, 2000), which establishes the National System of Conservation Units - SNUC, as well as the State Decree No. 44,417/2013 (Rio de Janeiro, 2013) that establishes the RESEX Itaipu. Moreover, INEA/DIBAPE Ordinance No. 120/2019 (Rio de Janeiro, 2019b) that creates the Deliberative Council of the Reserve and INEA Resolution No. 186/2019 (Rio de Janeiro, 2019c) that establishes the usage agreement, also support it, including addressing the anchoring activity in the study area of this paper.

In the municipal context, the Municipal Law No. 1,640/98 (Niterói, 1998), which establishes the Municipal Council of Environment of Niterói - COMAN and the COMAN Resolution No. 001/2019, focus of this article, were analyzed.

As for the economic instruments, the study covered two topics: environmental insurance and the autonomous bank guarantee - GBA at first request. For the first, the Article 9, XIII of Law 6,938/1981, the Decree-Law 73/1966 and the Minas Gerais State Law 23,291/2019 were analyzed. To complement the understanding of the topic, the book *Programas de Seguros de Riscos Ambientais no Brasil: Estágio de Desenvolvimento Atual* (Environmental Risk Insurance Programs in Brazil: Current Development Stage – Polido, 2018) was used as a foundation, as well as articles to substantiate the topic. For the second topic, the theoretical basis was used, among other sources, the book *A Responsabilidade Ambiental e a Garantia Bancária Autônoma* (Environmental Responsibility and the Self-Employed Bank Guarantee - Cunha, 2018), as it is a work by the Executive Secretary of the Municipal Environmental Council - COMAN and Under Secretary of Sustainability of the Environmental Secretariat of Niterói - SMARHS, RJ.

3. RESULTS AND DISCUSSION

Environmental Licensing

The Federal Constitution of 1988 (Brazil, 1988) assures, in Article 225, the fundamental right of everyone to have access to an ecologically balanced environment. In the same article, in paragraphs 2 and 3, the Constituent imposed the duty to repair the damage - and by a jurisprudential construction, we have the Principle of Integral Damage Repair - and the triple accountability of the offender (natural or legal person): civil, administrative, and criminal.

As a means to avoid, mitigate, or compensate environmental damages related to economic activities that are relevant to social life, the National Environmental Policy, Law 6,938/1981, establishes an instrument that is the administrative procedure called environmental licensing, based on the Prevention Principle. Therefore, the procedure involves the preparation and analysis of prior environmental studies, i.e., before the start of works and operation of enterprises, developed to suggest measures that aim to prevent, mitigate, or compensate future negative environmental impacts. In this way, the competent environmental agency, a member of the National Environmental System (SISNAMA), licenses the activity that causes or has the potential to cause environmental degradation and determines which measures will be applied.

In this sense, regarding competence, according to Article 23, III, VI, and VII of the Federal Constitution (Brazil, 1988), the Union, the States, the Federal District, and the Municipalities have common competence:

“III - protect documents, works and other assets of historical, artistic, and cultural value, monuments, remarkable natural landscapes, and archeological sites;

VI - protect the environment and combat pollution in any of its forms;

VII - preserve the forests, fauna, and flora; [...]” (Brazil, 1988)

And, according to the sole paragraph of the same article, it is established:

IX - “Complementary laws will set norms for cooperation between the Union and the States, the Federal District and the Municipalities, with a view to balancing development and welfare at the national level.” (Brazil, 1988)

Thus, in the Brazilian legal system, Complementary Law No. 140/2011 (Brazil, 2011) defines the attributions and rules of cooperation between the federative entities for the mentioned items, including environmental licensing.

In Brazil, the ordinary rite of environmental licensing is three-phase and deals with works or activities that potentially cause significant degradation to the environment, according to Decree No. 99.274/1990 (Brazil, 1990) and, subsequently, CONAMA Resolution No. 237/1997 (Ministry of the Environment, 1997). Thus, the normative diplomas show that the licensing comprises three stages, namely: the preliminary phase - project planning, the installation phase, and finally, the operation phase.

The environmental impact assessment regulated by CONAMA Resolution No. 01/1986 (Ministry of the Environment, 1986) is presented as a tool for environmental licensing that has as its products the environmental impact study and report (EIA/RIMA) – which is constitutionally provided for in the case of activities that potentially cause significant environmental impact. These assessment products are produced in the planning stage (before the preliminary license is granted) and present a survey of the features of the enterprise area, the possible impacts generated, and suggest mitigation, reduction, or compensation measures for negative impacts, and may even determine changes in the project.

The relationship between environmental licensing and the oil and gas industry leads to a discussion of the requirements of Law 9,478/1997 (Brazil, 1997), which has as one of its objectives the environmental protection. In addition, in Article 44, the law imposes on the concessionaire the duty to adopt measures to conserve the reserves and natural resources, also aiming at environmental protection.

Thus, due to the economic importance that the activity represents in the Brazilian territory and considering the significant impacts it generates to the environment, specific legislations for the environmental licensing process for the oil and gas industry have been established.

MMA Ordinance No. 422/2011, specific for environmental licensing for oil and natural gas production and exploration, establishes instructions for licensing seismic survey, well drilling, production and flowback, and long duration testing. In addition, it implements the polygon licensing method. In order to meet Law No. 6,938/1981, the MME/MMA Inter-ministerial Ordinance No. 198/2012, which introduces the Sedimentary Area Environmental Assessment (“AAAS”), was created.

The anchoring activity, specifically in the study area, according to INEA Resolution No. 186/2019 (Rio de Janeiro, 2019c), is allowed in four areas already approved by the

Brazilian Navy. However, to use these areas, platforms and support vessels must be registered as users in the RESEX. Furthermore, in addition to having an environmental license and contingency plan for oil spills or similar, an environmental authorization must be requested from the Deliberative Council of the RESEX.

In addition to the legislation presented above, there is another environmental protection tool related to the oil and gas industry: the areas to be bid on are first analyzed by the ANP, IBAMA, and state environmental agencies to formulate the environmental guidelines. The technical information, which is updated with each bidding round, and support are provided for the environmental licensing process. The work consists of the most recent and applicable environmental legislation for the area to be bid upon, as well as knowledge on the local ecosystem. This tool is a result of Resolution CNPE No. 8/2003 (National Petroleum Agency, 2003), as mandated by Article 2, V.

Economic Instruments in Environmental Licensing

As already mentioned, in Brazil, there is a triple liability of the offender for environmental damage. Specifically, civil liability for environmental damage is objective and based on integral risk, as already decided by the Superior Court of Justice (STJ, 2013):

“civil liability for environmental damage, whether for harm to the environment itself (public environmental damage), or for offense to individual rights (private environmental damage), is objective, grounded in the theory of integral risk, in view of the provisions of Article 14, Paragraph 1 of Law 6,938/1981, which enshrines the polluter-payer principle.” (Superior Court of Justice, 2013)

According to the general understanding, exclusions of civil liability for environmental damage are not admitted. Some scholars, such as Machado (2010) and Trennepohl (2019), however, believe that the exclusions of force majeure and acts of God are applicable, but those who claim them must produce evidence that it was impossible to avoid or prevent the effects of the necessary fact.

In jurisprudence, the STJ has established, under Themes 681 and 707, letter a, that:

“Liability for environmental damage is objective, informed by the theory of integral risk, and the causal link is the agglutinating factor that allows the risk to be integrated into the unity of the act, and the invocation, by the company responsible

for the environmental damage, of excluders of civil liability to remove its obligation to indemnify is unreasonable.” (Superior Court of Justice, 2013)

The risks, including environmental risks, are inherent to the activities subject to environmental licensing; thus, it is crucial to avoid the generation of unbearable externalities for society and to promote means that enable the status quo environmental recovery after damage.

Therefore, within this context and the recent understanding of the Federal Supreme Court (Theme 999) that “the claim for civil remedy for environmental damage is not subject to statute of limitations”, economic instruments can be important tools for both the company and the environmental agencies, in order to enable the harmonious coexistence between economic growth and environmental protection, enabling sustainable development. However, it is imperative to point out that environmental insurance and the Autonomous Bank Guarantee have a validity period.

Environmental insurance

Prompted by discussions during the United Nations Conference on the Human Environment in Stockholm in 1972, the theme of environmental insurance became more debated in Brazil in 1978, with the study group formed by the National Federation of Insurance and Capitalization Companies - Fensseg. The group developed a model of special conditions for the Insurance of Environmental Pollution Risks, considered daring for its time (Polido, 2018).

In 1991, the Instituto de Resseguro do Brasil - IRB, through a new study group, elaborated the specific Brazilian model of civil liability insurance for environmental pollution, through Circular PRESI No. 052/1991, later replaced by Circular PRESI No. 023/1997. With this milestone, according to Scorsin and Pires (2007), Brazil joined the group of countries composed of Germany, Sweden, the United States, Belgium, France, and Italy, which had coverage for environmental pollution. For Pereira (2017), the creation of the clauses by the IRB was driven by the United Nations Conference on Environment and Development - Rio-92 - which was planned to occur the following year.

Following the evolution of environmental insurance in Brazil, another specific policy for environmental insurance was presented in 2003. This one, prepared by Funseg, did not represent a significant progress for the market, considering that it was limited to a policy based on civil liability insurance, as well as the previous milestones. And, together with the fact that there was no considerable demand at the

time, there was no market adherence to the policies prepared.

Until then, all the clauses presented were based on European models, where the legislation that formulated environmental insurance was governed by the foundation of civil liability. This theory, however, was limiting and did not guarantee full coverage of the environmental risk. Thus, in Brazil, the market for the subject did not advance as expected (Polido, 2018).

Only in 2004, based on North American models, a nation that had the greatest evolution on the subject, the first policy regarding environmental insurance was launched, called Liability for Environmental Pollution Damage, launched by the AIG insurance company. Therefore, at this moment, the beginning of the commercialization of environmental insurance in Brazil is established (Polido, 2018).

However, due to the lack of legislation in force and applicable to the theme, there was no adhesion by insurers. In 2006, environmental insurance became a legal tool in the Brazilian legislation – an example of economic instrument for environmental protection found in the National Environmental Policy, inserted by Law 11,284/2006 (Brazil, 2006).

Even with the mentioned legal advance, according to Polido (2018), the framework also failed to arouse the interest of insurers at the time, since the legislation did not offer enough legal security for the operators of the product, nor even greater definition of the concepts. At that time, environmental insurance was treated as an adaptation of liability insurance, which is defined as “protection of the assets of the insured company against possible risks caused to third parties, whether bodily injury or property damage, arising from its responsibility involuntarily” (Santos, 2019, p. 22).

Even with the landmark beginning of commercialization, little progress on the subject can be perceived. According to Decree-Law 73/1966 (Brazil, 1966), which in its Article 20 establishes the compulsory insurances in the country, environmental insurance is not one of them. This reality is different, for example, in Colombia, which based on Law 491/1999, establishes compulsory insurance for all human activities that can cause measurable damages to certain people and that are subject to environmental licensing to cover personal losses that are part or consequence of environmental damage and natural resources (Neto and Menezes, 2019).

Thus, currently in Brazil, environmental insurance still needs further development to be more widespread and to conquer its space in the market. According to Polido (2018), in order to be successful, society needs to develop more, as well as the legislative requirement to hold the polluter

accountable and to respect the Brazilian environmental protection norms.

However, in the current market there is a concern and a higher level of demand from investors for companies to have practices aligned with environmental commitments. An example are the ESG - Environmental, Social, and Governance - investment funds, which, according to Linhares (2017), consider sustainable, financial, and economic criteria to evaluate the performance of companies. Therefore, even though there are difficulties for the development of the environmental insurance market in Brazil, it can be seen that the influence of the corporate and investment branches can contribute to this.

In this context, as an example of the progress of the theme, we cite Bill No. 3,729/2004 (Brazil, 2004) on general rules for environmental licensing, which addresses liability insurance as a possible instrument to be required by the licensor to eliminate or reduce damage to the environment. Moreover, State Law No. 23.291/2019 (Minas Gerais, 2019), on tailings dams, determines in its Article 7, I, b, the presentation of an environmental bond as one of the criteria to be presented by the entrepreneur to obtain the preliminary license, aiming to ensure the social and environmental recovery for cases of accidents and for the deactivation of the dam; and, still in the context of mining activities, Law No. 14,066/2020 (Brazil, 2020) on dam safety, whose Article 17,066/2020, Paragraph 2, authorizes the supervisory body to use financial guarantees in dams.

The autonomous bank guarantee

According to Galante (2016), the Autonomous Bank Guarantee - GBA, also known as Bank Surety, became more widely used after the end of World War II, when international commercial transactions intensified and needed greater security and agility. The security of the transactions between the parties originated through the contractual bond to a bank, in which, according to Telles (1988), the financial institution was responsible for paying a monetary amount in case of bad or no execution of the basic contract between the parties. The agility, on the other hand, came from the availability of the money to the beneficiary free of possible obstacles imposed by the bank or the debtor (Galante, 2016).

In the case of GBA, at the first request, which is the subject of this paper, the release of the benefit is even faster: it is up to the banking institution to immediately release the funds when requested. In short, according to Pinto, the GBA:

“Already pointed out as paradigmatic of the innovation effort in banking law 1, the autono-

mous bank guarantee assures its beneficiary a double security. On the one hand, the guarantor, being a banking institution, is endowed with a special financial solidity. On the other hand, the guarantor cannot refuse to pay the guaranteed amount on the basis of possible vicissitudes relating to the contract between the beneficiary and the guarantor”. (Pinto, 2010, p. 34).

In this context, the GBA is configured by three relationships: first, defined by a base contract between the parties to the transaction, that is, between the main creditor and debtor; second, between the bank (which guarantees the payment) and the main debtor; and third, the relationship between the bank and the main creditor (beneficiary). When the creditor is found to have breached or failed to perform the basic contract, he asks the bank for the agreed monetary fund. The banking institution, in turn, releases the amount. It is then reimbursed by the debtor, plus a commission (Cunha, 2018). According to Pinto (2010, p. 38), this relationship is called a hedging relationship, understood in more detail by:

“In the relationship between the principal and the guarantor bank (cover relationship), the latter undertakes to the former to issue a guarantee in favor of a third party, the latter undertaking to pay a commission to the latter and to reimburse it immediately if the latter has to pay the guaranteed amount to the beneficiary of the guarantee. This hedging relationship is governed by a contract between the principal and the guarantor bank, which most doctrine defines as a mandate contract without representation.” (Pinto, 2010, p. 10)

Relating the GBA to the case study in question, linked to the environmental licensing process, it consists of a condition that ensures the immediate availability of funds, proportional to the activity developed and associated risks, in cases of environmental accidents caused by the activity subject to environmental licensing. Thus, the company responsible for the enterprise commits itself, even before the beginning of its operation, to present the monetary fund with the banking institution, sufficient to repair or contain possible damage to the environment, consistent with its activity.

From the environmental point of view, the GBA becomes an efficient tool due to the speed with which the agreed value is made available by the banking institution to the creditor, causing the environmental damage to be contained or mitigated quickly, avoiding its consequent propagation and mitigating its power of destruction. Therefore, this is the main differential among the other economic tools related to environmental protection: there are no bureaucracies or ex-

tensive procedures that can delay the repair of the damage due to the availability of funds. In this sense, the GBA seems to be interesting for covering indemnities arising from the aforementioned civil liability.

However, a major problem regarding economic instruments applied to environmental damages is their pricing and predictability. Therefore, even though the environmental legislation in force recognizes economic instruments as a method for repairing environmental damages, little progress has been made with respect to the methodology for valuing them, which hinders the broad and safe application of economic mechanisms.

Marine Extractive Reserve of Itaipu (RESEX-Itaipu)

Extractive reserves are considered Sustainable Use Conservation Units according to Law No. 9,985/2000 (Brazil, 2000), which establishes the National System of Nature Conservation Units - SNUC. Thus, they are areas in which the use of their resources is allowed, but in a sustainable way, ensuring the conservation of the environment and of the ecological cycles. In addition, the creation of Extractive Reserves aims to preserve natural resources and the culture of local populations.

State Decree No. 44,417/2013 (Rio de Janeiro, 2013) establishes the Itaipu Marine Extractive Reserve - RESEX Itaipu in the municipality of Niterói/RJ, to be managed by the State Environmental Institute - INEA. The area, of approximately 3,943.28 hectares includes the marine region adjacent to the beaches of Itacoatiara, Itaipu, Camboinhas, Piratininga, and the Itaipu lagoon, and is inhabited by a fishing population that uses artisanal and traditional methods to carry out their subsistence activity.

According to Article 27 of Law 9,985/2000 (Brazil, 2000), the Conservation Units must have a management plan, which is a technical report that establishes the norms applicable to the Unit, the management of natural resources, and its zoning. According to Article 18, Paragraph 5, the aforementioned document must be approved by the RESEX's Deliberative Council.

According to INEA's website, RESEX Itaipu does not yet have a management plan; however, the composition of its Deliberative Council was defined by Article 2 of INEA/DIBAPE Ordinance No. 120/2019 (Rio de Janeiro, 2019b), having representatives from public agencies, e.g., INEA and SMARHS; from Organized Civil Society; and from the traditional beneficiary population, according to fishing modalities.

In State Decree No. 44,417/2013 (Rio de Janeiro, 2013), it is possible to access restrictions and permissions of the

reserve, such as the authorization established in Article 5, of interest to COMAN Resolution No. 001/2019, case study of the present article:

“Article 5 - The freedom of navigation and the anchoring of vessels is ensured, respecting the provisions of this Decree, and any measure that will affect the order of maritime traffic and anchoring within the limits of the Itaipu RESEX will depend on the prior consent of the competent maritime authority.” (Niterói, 2019b)

According to Article 18, Paragraph 1, and Article 23 of Law 9,985/2000, the usage contract for Extractive Reserves is established:

“Paragraph 1, The Extractive Reserve, is of public domain, with use granted to traditional extractive populations as provided in Article 23 of this Law and in specific regulation, and the private areas included in its limits must be expropriated, in accordance with the provisions of the law.” (Brazil, 2000)

“Article 23, the possession and use of the areas occupied by traditional populations in Extractive Reserves and Sustainable Development Reserves, shall be regulated by contract, as provided in the regulation of this Law.” (Brazil, 2000)

For RESEX Itaipu, the usage contract was approved through INEA Resolution No. 186/2019 (Rio de Janeiro, 2019c) and any non-compliance with the imposed guidelines will be susceptible to legal penalties.

COMAN Resolution 001/2019

The Municipal Council of Environment of Niterói has its creation by the Article 15 of the Municipal Law no. 1,640/1998 (Niterói, 1998). It is characterized as an organ of normative, consultative, deliberative, inspecting, and advisory character to the Municipal System of Environment – SIMMAN – and supported by the Secretary of Environment of Niterói – SMARHS.

Among the attributions conferred to the COMAN, according to Article 16, II of Municipal Law 1,640/1998: “to establish norms and standards for the protection, conservation, and improvement of the environment and municipal *water resources, observing the federal, state, and municipal laws*”. At this juncture, COMAN Resolution No. 001/2019 (Niterói, 2019a) was instituted on July 30, 2019 by the Municipal Council of Environment of Niterói - COMAN, during the 7th Regular Meeting of 2019 (Niterói, 2019b):

“[...] Resolution of institutionalization of the autonomous bank guarantee, the first demand imputed to the operators anchored inside the Itaipu Resex, the Executive Secretary of the Council, Mr. Gabriel Mello Cunha, reads the Resex Proposal Motion where the representatives of the institutions that make up the Deliberative Council of RESEX Itaipu, worked on top of the Minute of the Motion proposed since 2013, expressing the interest that some norms be included in the conditionalities of activities that cause significant impacts to the environment anchored inside the Resex to be licensed in the area covered by RESEX Itaipu. The Executive Secretary of the Council continues his presentation exposing that the proposed Motion was submitted to COMAN’s C.T of Environmental Legislation and debated on 09/07/2019 and was unanimously approved by those present.” (emphasis added).

The resolution focuses on degrading activities, especially those linked to the oil and gas exploration industry, to be carried out in the RESEX-Itaipu. Thus, through Article 2, it implements the Autonomous Bank Guarantee at first request as a condition of the environmental licensing process for protection against possible damage in the Reserve:

“Article 2, The financial guarantees, will be constituted through a condition of the licensing required by the competent licensing agency to obtain autonomous bank guarantees on first demand even if for participation in environmental funds or the constitution of own funds reserved for this purpose.” (Niterói, 2019a).

Furthermore, the resolution opens the possibility for the value of the guarantee to be based on the amount established by the competent licensing body for the environmental compensation of the activity or undertaking under Article 36 of Law 9,985/2000. It should be clear that environmental compensation is not to be confused with the GBA, since the former must be paid by the entrepreneur regardless of any damage incurred. Regarding the applicability of the resolution under analysis, it is a (non-binding) suggestion of an environmental condition, since the RESEX was created by the state environmental agency (INEA), and it is this agency’s competence to license the activities in this location, in accordance with Article 8, XV of LC No. 140/2011. In any case, it is also worth mentioning that the RESEX Council, chaired by INEA, is responsible for issuing the environmental permit for the anchoring activity. At this juncture, it is important to point out, however, that if it is the case of offshore oil exploration and production activities, the competence for environmental licensing lies with IBAMA.

On this aspect, although there is not yet a real case to be analyzed, since no authorization has been issued after the issue of COMAN Resolution 001/2019, it is worth commenting that, in theory, there would be no obstacle to the application of the condition, since INEA is also part of the COMAN that unanimously approved the resolution. And in the case of IBAMA, the agency would be imposing a condition to the activity in favor of the environment. However, it is understood that the COMAN Resolution in question binds only the environmental licensing conducted at the municipal level, by delegation of the State, as provided in LC No. 140/2011.

4. CONCLUSION

Through the research conducted in this paper, it is understood that the GBA, at first request, presents itself as a tool for environmental protection, linked to the environmental licensing procedure. Considering the agility with which the funds are made available, the GBA becomes an important economic instrument, standing out even in relation to environmental insurance, since it avoids bureaucracy and delays, with regard to civil liability.

However, it is worth mentioning the problem of pricing environmental damages, as well as their quantification for each study area and their predictability. Although the environmental impact study process is robust and multidisciplinary, it is difficult to relate it economically. This fact is an impediment to greater application of economic instruments linked to the repair of environmental damage.

Another obstacle is the lack of dialogue between financial guarantees related to environmental protection and Brazilian legislation. It is noticeable how little the economic instrument is approached in the legal sphere, when applied as a resource to reverse or prevent damage to the environment. Thus, the lack of legal recognition and details about the applicability supported by law does not favor the interest of the parties regarding the application of the instrument. Therefore, further legal study and consequent application of financial guarantees by Brazilian law is necessary.

Therefore, without real cases of application of COMAN Resolution 001/2019 in environmentally licensed activities in the municipality of Niterói-RJ, it is understood that further studies are needed for the best use of financial guarantees, such as the GBA, its advantages, and how it can be more efficiently applied in environmental licensing processes in the three spheres of the federation.

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Received: December 30, 2020

Accepted: November, 16, 2021

DOI: 10.20985/1980-5160.2021.v16n3.1699

How to cite: Ferreira, J.M., Silva, L.M.C., Pereira, L.V. (2021). Economic instruments in environmental licensing: the autonomous bank guarantee foreseen in CONAMA Resolution 001/2019 (Niterói, RJ). *Revista S&G* 16, 3. <https://revistasg.emnuvens.com.br/sg/article/view/1699>