TEMPLATE FOR COMMENTS

Document reviewed	
Title of the draft being reviewed:	Environmental Performance Guarantee
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General Comments

This document has been reviewed by a multi-disciplinary team of experts in this field under the umbrella of the Pew-sponsored 'Code Project'. As this document recommends significant revisions to ensure that the Standard and Guideline concerning an Environmental Performance Guarantee is fit for purpose, it is strongly recommended that a second opportunity be provided to stakeholders to review and comment upon the document following any initial revisions. Key points of concern include the following:

- The scope of the EPG should be widened so that it does not pertain only to closure obligations but can be used for any environmental management costs that the Contractor is unable to meet.
- A Contractor should not be given wide discretion to determine for itself the nature and the amount of its EPG.
- An EPG must be accessible to the ISA in all circumstances, including the insolvency of the Contractor.
- The Council should be given a decision-making role in relation to the adequacy of the proposed EPG.

Purpose of an EPG:

1. This draft document is premised on an overly narrow draft regulation. At present, the Environmental Performance Guarantee ("EPG") is restricted to closure matters: "(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." [draft Exploitation Regulation 26, ISBA/25/CWP.1] This is a decommissioning guarantee only. However, the function of the EPG should be like that of a bond, as it is used in many national jurisdictions: to incentivise and secure the performance by the Contractor of all of the requirements of the Plan of Work – not just those related to closure – and to ensure that the ISA does not bear the cost of default of the Contractor or its failure properly to perform the Plan of Work.

2. It is also important that unforeseen emergency incidents and response actions are included in the scope of the EPG, as these may well be higher-risk, higher-impact events, and yet are unlikely to be factored into a Contractor's regular project budgeting.

3. This would also be more consistent with the existing Exploration Regulations, whereby the Contractor must "*provide the Council with a guarantee of its financial and technical capability to comply promptly with emergency orders or to assure that the Council can take such emergency measures*." (see Nodules Reg. 34(8), Sulphides Reg. 35(8); Cobalt Crusts Reg. 35(8)). This was endorsed as a 'direct obligation' for sponsoring States by the Seabed Disputes Chamber of the International Tribunal for the law of the Sea (ITLOS) (Advisory Opinion no.17, February 2011, paras. 122, 138, 236). A Plan of Work needs to be guaranteed in all respects, to indemnify the Authority (and the sponsoring State) for costs related to performance of the Plan of Work.

4. As a more appropriate approach to risk-based regulation, and a precursor to updating this guideline, draft Regulation 26 should be expanded to include a Contractor's environmental management commitments and liabilities throughout the life of the exploitation contract, and/or a need for emergency response in the event of unexpected incidents occurring.

5. This point has already been raised during ISA discussions on the draft Exploitation Regulations, including in written submissions that are yet to be addressed in the drafting process. Australia, for instance, in its comments on the draft Regulations recommended adding to draft Regulation 26 "(aa) The repair of an in-service submarine cable or pipeline in, or adjacent to, the application area that was damaged as a result of the Contractors activities; and (ab) Responding to, and remediating, a significant environmental incident." The Deep Sea Conservation Coalition made similar observations, stating that the scope of draft Regulation 26 was too narrow. Further suggestions on DR 26 can be found in ISBA/26/C/CRP.1 (Collation of specific draft suggestions by members of the Council). ISBA/26/C/2 noted that the Commission had previously considered that further discussion with relevant stakeholders was required in order to advance the content of draft Regulation 26 (ISBA/25/C/18, para. 21).

6. Finally, the principal motivation for the ISA regulatory instruments on the EPG should be to guarantee funds for, and ensure fulfillment of, a Contractor's obligations. The impact on a Contractor's profits should not be a primary consideration. Contractors are required, by UNCLOS, to have appropriate financial capabilities to deliver their contract. Only if a proposed mining project is economically marginal and the Contractor of weak financial standing would the costs of the guarantee significantly affect the commercial viability of the mine.

Scope of an EPG:

7. The Standard should mandate that the EPG can be applied to all costs within the "EPG Scope" (as defined therein) that the Contractor is unable to meet. The standard, as current drafted, limits the EPG to covering "unexpected" costs that the Contractor is unable to meet. This is an important distinction, as there maybe occasions (for example, in bankruptcy) where a Contractor cannot meet expected EPG Scope costs.

8. In considering the scope of the EPG, the ISA may also wish to consider what types of harm are unlikely to be covered by the insurance that contractors will be obliged to hold (in addition to the EPG). For example, insurance does not usually address costs of remediation for harms caused by planned activities; or harms resulting from deliberate non-compliance with conditions, or inaction

by a contractor due to insolvency. These are all scenarios that should be considered in setting the scope of the EPG.

9. The foregoing observations are important not only for enabling the ISA to use the EPG effectively as a regulatory tool, but also for calculation of the quantum of the guarantee. The amount of the maximum financial security required to meet a wider set of events / commitments will be higher.

Third party roles:

10. The ISA should not accept any EPG that relies on a third-party financial institution without evaluating that organization against a set of stipulated financial acceptance criteria. For example, the security provided by a letter of credit is dependent on the financial soundness of the bank providing the letter, and the security provided by a surety bond is dependent on the financial strength of the underwriting insurance company.

11. The requirement of an independent validation to confirm the form and calculation of the guarantee is welcome. However, this concept requires further elaboration. The Standard and Guidelines need to better defined "independence." And to ensure independence, and to promote meaningful compliance with this requirement, the ISA should either have to approve validators selected by contractors before their appointment, or else the ISA should appoint the validator.

Role of the regulator:

12. The Legal and Technical Commission (LTC) should clarify which, if any, parts of this document, are intended to be legally binding; and the Council should provide its own decision in this regard. The Draft Exploitation Regulations refer to 'Standards' which are legally binding on the ISA and Contractors, and 'Guidelines' which are advisory only. Draft Regulation 26 on the EPG refers to 'Guidelines' only and makes no mention of 'Standards'. This document, however, refers to Appendix 1 as a 'Draft Standard' and Appendix 2 as 'Draft Guidelines'. This raises the following question - can Appendix 1 be a legally binding Standard when Regulation 26 refers to Guidelines only?

13. In order to achieve the objective of an EPG (i.e of ensuring environment harm is minimised and remediated as far as possible, and protecting the ISA from incurring unexpected costs and liabilities as a result of contractor lack of funds) the EPG needs to be in such a form that it will survive and remain accessible to the ISA past the insolvency or other dissolution of a contractor. This would mean that a form of EPG that requires, for example, regular subscription payments by the contractor, would not be satisfactory, as the EPG could fail if a contractor stopped making the payments (e.g. for reason of insolvency etc.). This point does not appear to be clearly made in the Standard, and this aspect - and any other considerations about how insolvency of a contractor may affect an EPG or be handled by the ISA, should be emphasised and expounded upon further in these documents.

14. In order to ensure an accessible EPG, the ISA should consider an EPG Fund (or 'decommissioning fund'). The way the Fund would work is that: Contractors would make

payments into this Fund equal to the EPG Scope costs; and after the contractor has met all its EPG Scope obligations the balance of the Fund would be released to the contractor. However, if the contractor cannot meet EPG Scope costs then the ISA can use the Fund to meet such costs.

15. Notably absent in the Standard and the Guideline are provisions outlining the LTC and Council's specific role in decision-making about the EPG, and the criteria they should use to assess and decide upon the acceptability of the Applicant / Contractor's proposed EPG form and amount. The Standard and Guideline appear to leave such assessment and decision largely to the contractor's own discretion. This should be amended. Stringent, clear and objective criteria for ISA assessment as to the form and amount of the EPG for each contractor should be introduced, otherwise the EPG will not serve as a useful regulatory tool.

16. The Standard should require that the independent validation statement, the EPG Declaration, and the EPG Confirmation are all made publicly accessible by the ISA (e.g. via the Seabed Mining Register) upon contract award.

Specific Comments		
Page	**Line**	**Comment**
'Background' note prefacing the draft Standard and Guideline		
	Pass -im	Throughout the documents the EPG is referred to variously as 'Environmental Performance Guarantee', 'EPG', 'guarantee', 'Guarantee'. Using one term consistently would avoid confusion
	Para. 1	It would be useful for posing inquiries, more consistent with past practice, and more transparent and accountable if the ISA Secretariat were to disclose the name of the consultant(s) who assisted in the preparation of the documents under consultation.
	Para. 3	This section states that "*The Commission considered that a balanced approach should be taken between environmental concerns and the need to ensure the development of activities in the Area. Such balance includes: 1) ensuring that the form and amount of the environmental performance guarantee do not hinder the ability of contractors to participate in activities in the Area; and 2) ensuring that the Authority has the full amounts required to cover the costs of the events identified in the scope of Draft regulation."* Such a "balancing" would be inconsistent with the UN Convention on the Law of the Sea, which speaks to "necessary" measures for the effective protection of the marine environment (Article 145) and human life (Article 146). There is no qualification in either article such as is implied by Paragraph 3 of the draft, and no "balance" between environmental protection and mining operations. Indeed, neither the proposal of a "balanced" approach (paragraph 3) nor a "flexible" approach (paragraph 4). are appropriate when designing the rules for the EPG. The very nature of such a guarantee is that it should provide a firm security to meet "likely costs, expenses and liabilities" as set out under Reg 26. The approach chosen is thus conceptually not consistent with the rationale of an EPG.
Appendix 1 **Draft Standard on the form and calculation of an Environmental Performance Guarantees**		
3	*34-38*	Please see the comments above about 'Purpose of the EPG' and 'Scope of the EPG'. In brief, it is recommended that the EPG scope should include any cost

		incurred at any time pertaining to environmental management obligations of the contractor, which the contractor is unable or unwilling to meet. This will require amendment to the draft Regulations, which can then be reflected in equivalent revisions to the draft Standard and Guidelines.
3	42	A Standard is a legally binding instrument, according to the draft Exploitation Regulations. The word 'shall' is used throughout this 'Introduction' section, which can be interpreted in a legally binding document as meaning 'must'. It is not clear, however, whether this Introduction section is actually intending to make legally binding provisions, or whether it is simply introducing the rest of the document, where the substantive binding provisions are found. If the former, then there may be inconsistencies between the wording in the Introduction section, and the wording in the subsequent sections, which address the same matters. Such ambiguity and inconsistency should be removed.
3	44	As part of its review of the EPG, the LTC should also confirm an Applicant's compliance with Part D regarding the requirements of a Validation Report.
3	52-53	The Standard here repeats the Regulation 26 stipulation that the EPG must be lodged '*no later than the date on which production in the approved Mining Area commences*'. There appears to be no further instruction or guidance in the documents under consultation as to the timing of the lodgement of the EPG. It is suggested that this matter is given further consideration, and additional detail be provided in the Standard and Guideline. For example, the ISA should be empowered to require a contractor to lodge an EPG earlier than the date of production if high-impact or high-risk activities are planned by the contractor before production date (e.g. large-scale testing of mining machinery). Indeed it should be recalled that this type of early activity and the need for prior guarantee from the contractor, was a particular concern for the Council o the ISA, as early as 2000 [ISBA/6/C/12].
3	*55-57*	The ISA should indeed maintain discretion to require an EPG to be maintained beyond the life of the contract, as it can be anticipated that post-contract monitoring may be required for extensive periods, and/or that liabilities arising from exploitation contractor activity may come to light after (and even long after) a contract has terminated. However, the Standard and Guideline would benefit from more explanation as to the length of time for which the EPG may be held, the rationale behind this, and the criteria that the LTC should apply in making a recommendation (and that the Council should apply in making a decision) in this regard.
3	*58*	If the EPG is lodged with the ISA, it is confusing as to why a contractor must "*ensure the Authority can access the Guarantee.*" Under what circumstances could the contractor influence how the ISA accesses a Guarantee which is held by the ISA? If this wording relates particularly to the concept of a "self-guarantee" or "company-guarantee," it is strongly advised to remove this form of guarantee from this Standard, and then to remove this clause from line 58. The rules should collectively ensure that all forms of EPG must constitute funds that are either held by, or accessible by, the ISA, independently of the contractor.
4	65-67	The Standard's 'Purpose' is described as *'describing how the Authority will administer the requirement for an EPG'*, and to *'explain…'* aspects of the EPG

		process. This does not seem correct. The Standard's purpose should be to set out in more detail the specific obligations arising for contractors and for the ISA, with regards the EPG requirement and process. Using the language of '*describing...explains*…' undermines or obfuscates its actual purpose as a legally binding regulatory instrument of the ISA.
4	70	At present "appropriate forms of guarantee" are listed in the Guideline and are therefore non-binding. These should instead form part of the Standard.
4	71-73	Here and elsewhere, the Standard introduces the concept of "greatest reasonably credible costs" (and variations on that terminology) as an objective metric, but without any definition, explanation, or description of methodology for its determination. It makes sense to base the calculation of the EPG around a "worst case scenario," but further detailed is needed to understand how these costs can be determined.
4	84-85	It is unclear why 'Definitions' is included twice in separate places in the content list (at II.A, and X.) It is suggested to merge these into one 'Definitions' section.
4	89	III. A.11. refers to "unexpected" costs, expenses and liabilities that a contractor is "unable" to meet. This conflates two concepts. The fact that costs are unexpected in no way implies that a contractor is unable to meet them, as a contractor may well have sufficient reserves and other resources to successfully cover even unexpected costs. It is also unclear how the term 'unexpected' aligns with the scope of an EPG currently set out by draft Regulation 26, which pertains specifically to delivery of the closure plan - and not to unexpected events. Finally, it is unclear how the "unexpected" aspect raised here sits within the process of estimating the value of an EPG - there needs to be some expectations as to the costs associated with the scope of the EPG. A better formulation of paragraph 11 would be: "The Guarantee is required to ensure performance of the Plan of Work, harm caused by planned activities, or harms resulting from a failure by a contractor to act, for example due to deliberate non-compliance with conditions, or a supervening financial situation or insolvency. These would also include expenses and liabilities that a Contractor is unable to meet. These are all scenarios in which a Environmental Performance Guarantee would be available to meet the cost of ensuring that the steps required by the relevant Plan of Work are taken."
4	91-93	It is unclear why *is the* guarantee is structured so as *"not to cover ordinary and foreseen operating costs, such as the costs of compliance with conditions of the Exploitation Contract or tortious liability for environmental damag*e' How are these aspects otherwise being covered / guaranteed? Failure by a contractor to deliver on its emergency response plan, for example; or to meet the costs of a legal claim for damages from a polluted adjacent coastal state are real risks to which the ISA and humankind are exposed. The scope of the EPG should be considered, along with other aspects of the ISA's regulatory regime, to ensure

		that such matters are comprehensively managed, and the ISA obtains appropriate guarantees and indemnities wherever the risks lie. In addition, a contingent liability, like tortious liability, should not be exempted from payment of an EPG if it is a liability incurred and the contractor is unable to pay. The exemption for "tortious liability for environmental damage" should be deleted.
4	94-95	Paragraph 13 requires each Applicant or Contractor to estimate costs that may need to be covered by an EPG. Precise quantification will be difficult, and certain predictions and economic analyses will be required. It seems likely that operations in the same region, for the same resource, would be likely to incur similar types and amounts of costs. For that reason, it could be sensible for the ISA to conduct its own analyses in this regard, and thus have a benchmark against which to review proposed EPG's from individual Contractors. Aspects of this, for example, the costs categories, could be shared with Contractors in the Guideline. This would be likely to assist with Contractor compliance and avoid disparities in approach between Contractors which could unfairly and negatively impact one Contractor compared to another.
5	96-97	The Standard here uses the term '*highest reasonable cost*'. Elsewhere (e.g. paragraphs 8, 18, 21) the term '*greatest reasonably credible cost*' is used. If different meaning is intended by the different terms, this should be explained. If the same meaning is intended, the same term should be used consistently throughout.
5	98	Paragraph 14 should be deleted. It is an unnecessary repetition of the items listed in Regulation 26(2)(a)-(c), but confusingly seems to add the new, misplaced concept that costs under the EPG scope should be 'reasonably estimable'. The use of the term 'liabilities' in this paragraph (rather that 'costs, expenses and liabilities' as used elsewhere) may also cause confusion.
5	102	It is recommended that the allowable forms of the EPG are included in the (binding) Standard, not part of the (recommendatory) Guidelines.
5	112	Where the Standard requires the Applicant to provide details of 'the calculation of the Guarantee' it is not clear whether this means: the specific amount proposed, or the method of calculation, or both. It is suggested that both should be provided, with narrative explanation and justification designed to facilitate the LTC's review of the proposal.
5	114-124	The Standard's potential forms of the EPG are keyed to Applicant's Closure Plan. This will require revision to take into account broader contingencies and a re-drafting of draft Regulation 26, should this recommendation be adopted, as discussed above.
5	115-117, 129, 196-197	Here and elsewhere, the reference to 'the Authority's endorsed method' [for a cost estimation tool] or "accepted calculation tool" for calculating costs, expenses, and liabilities is confusing, as there are no endorsed methods, or process for obtaining endorsement of a method, set out in the Regulations, Standard or Guideline. Indeed at line 423 in the Guideline it states that '*The Commission does not endorse any single cost estimation tool for calculating the Guarantee."* This makes it difficult for a Contractor to '*conform to the Authority's endorsed method'.* It would be helpful for the Standard to specify the

		process, rules, and responsibilities applicable in identifying an "endorsed method" or "accepted calculation tool" for calculating costs, expenses, and liabilities.
5	116	The Standard here describes the EPG as needing to cover costs 'that may arise from the Applicant's Closure Plan' only, as opposed to the EPG Scope, creating a potential inconsistency.
5	126-127	Paragraph 19 gives the Applicant/Contractor absolute discretion to decide on the form of EPG that will be offered. This is an inappropriate degree of discretion. The ISA should retain powers to require a particular form of EPG in certain circumstances, for example where the EPG is calculated to be particularly high, where a Contractor has little record of past performance or is capital-constrained, or where the Contractor may have been able to access only a lower-level of insurance than other Contractors. The accessibility of the funds, and ensuring their accessibility past the insolvency or other cessation of operation of the Contractor, may also be relevant considerations for the ISA. These types of criteria need to be elaborated and included in the Standard, so the LTC has clear parameters for its review and recommendation, and the Council has clear parameters for its decision-making.
5-6	132-137	Paragraph 21 of the Standard requires the Contractor to 'select a cost estimation tool'. It would be helpful if this Standard gave some further information about, and examples of, the types of 'cost estimation tools' that may be considered appropriate (or 'accepted' as per paragraph 18(b)). The Standard should specify that the estimation tool and calculation process should include summaries of: • Any assumptions made; • Any uncertainties, with the percentage allowed for uncertainties disclosed; • The site-specific details used to inform the calculation of costs.
6	138	Paragraph 22 provides that '*A Guarantee is required for all non-contiguous Mining Areas to which a Plan of Work relates*'. This drafting reads oddly and could be taken to imply that, conversely, a Guarantee is <u>not</u> required for any contiguous Mining Areas, which presumably is not the intention. Paragraph 22 should be amended to clarify the intended meaning and implications. Possibly it is supposed to provide that there should be a <u>separate</u> EPG for <u>each</u> Mining Area, where there is more than one non-contiguous Mining Area under one contract? Or the word "non-contiguous" could be deleted, so that the provision reads instead "A Guarantee is required for all Mining Areas to which a Plan of Work Relates."
6	143-144	As discussed above, basing the calculation of the EPG on Closure Plans exclusively will provide insufficient protection, and this aspect of the draft Regulations (and the Standard and Guideline) should be revised.
6	149	The reference in paragraph 24(a) to '*paragraph 19 of the Guidelines*' appears erroneous. Should this be 'paragraph [17] of the Standard'?

6	155 and 160	Paragraphs 25 and 26 refer to "independent validator(s)", and the requirement of 'independence' is repeated several times, but not defined or explained. Does this mean independent from the ISA, or from the Contractor, or both? What criteria or indicators constitute independence? Under paragraph 27 their "independence" and "experience"/ "competence" seem to rely only on a statement by the relevant validator.
7	170	Paragraph 28 requires production of the Validation Statement to the LTC '*at the time of submitting the proposed Guarantee*'. It seems likely that this means: at the time of making the application for a contract / plan of work for exploitation. But this could be helpfully clarified.
7	179	Paragraph 31(b) refers to a Contractor's *'legal duty to maintain and make accessible*' the EPG over the life of the Exploitation Contract. It is not clear from where that legal duty derives. Is it paragraph 6 of the Standard? Paragraph 6 is worded differently from paragraph 31(b). It would be clearer and more consistent if Paragraph 31(b) referred by name / number to the Regulation or other rule that to which it means to refer here. It would also be helpful for the Standard expressly to state what the consequences might be for a breach of the legal duty referred to in paragraph 31(b), with reference to the different sanctions for Contractor non-compliance outlined in the draft Regulations.
7	188	In order to confirm (to all external stakeholders) that the EPG is in place, the EPG Confirmation should be issued by the ISA, not by the Contractor, and the details listed in paragraph 36 about the calculation of validation of the EPG should be contained within the EPG Declaration by the Contractor. As such, the EPG Confirmation would simply be a confirmation from the ISA that the Guarantee has been lodged and the funds available. The reference to Regulation 26(2) here may be misplaced. That provision speaks to the form and amount of the EPG needing to meet Guidelines.
7	188-197	It is unclear why the Contractor is required in paragraph 36 to certify its own cost estimation tool, which would seem to be the purpose of the Validation Statement provided by an independent expert third party.
7	193-194	Paragraph 36(a) refers to 'the reasonably identifiable and estimable costs'. This is inconsistent with 'the greatest reasonably credible costs' and the highest reasonable costs' terminology used elsewhere in the Standard, and also different from 'the likely costs' used in draft Regulation 26. It is unclear whether the inconsistency is intentional.
7	198-199	Paragraph 36(c) requires the Contractor to confirm that the EPG has been lodged with the ISA, 'when lodging' the EPG. Technically this is not possible to do accurately - as the EPG cannot have been lodged at the time of making that statement.
8	209	Paragraph 40(c) appears to impose a duty upon a consortium Contractor that is not otherwise imposed upon other Contractors. This requirement (for Contractors to ensure that the EPG will be immediately accessible by the ISA at the point where costs, expenses and liabilities arise and are unable to be met by the Contractor) should apply to all Contractors. Generally, it is recommended that a group or consortium be required to meet the same requirements as for an

		individual Contractor, and that the substance of clauses 40 and 41 be removed, simply leaving clause 42.
8	242-244	Paragraph 44 should not preclude the possibility of third-party guarantors.
8	246-247	This section concerning the review of a guarantee is yet to be drafted. It is hoped this will contain clear and objective criteria for the LTC's review and recommendation, and the Council's decision, with regards an Applicant's EPG. The reference to Regulation 26(6) may be misplaced here, as this provision concerns the policies and procedures for holding (as opposed to reviewing) a guarantee.
9	251-267	Paragraph 46 includes wide-ranging options for a release of the obligations, including a transfer and a change of control. Generally, there should be no release of such obligations until the project is fully completed. Further, it is unclear why a change of control of a Contractor would require the release of an EPG. This may be a situation for review of the EPG, but the Contractor remains the same legal entity and the pre-existing EPG should remain valid. What the Standard does not address, in paragraph 46 or elsewhere, is where the identity or status changes of a third-party who is providing aspects of the EPG. Paragraph 46 is also phrased in passive terms i.e. the EPG 'shall be released' which does not allocate specific responsibility and explain who is taking the decision about the release.
10	269	Figure 2 is confusing and appears to contain text and ideas not included in the Standard. The Standard is a legally binding instrument; and it is recommended not to include a flow-chart in a legally binding instrument as it may be unclear to what extent the flow-chart is intended to create binding obligations.
10	280-289	Paragraphs 48 and 49 imply that the LTC will make a recommendation about whether to allow partial release of an EPG and if so the amount. It follows that the Council should subsequently decide on those points, but the Standard is silent about that aspect.
11	295	The Standard does not appear to permit a circumstance in which total forfeiture of the EPG may occur: is that intentional? It would be helpful if the Standard indicated whether the EPG may in fact be forfeited in whole or in part as a penalty for non-compliance, as seems to be envisioned in draft Regulation 26(3)(b).
Appendix 2 Draft Guidelines on the form and calculation of an Environmental Performance Guarantee		
13	333-340	The EPG Scope should be expanded in line with suggestions made above (in relation to the 'purpose of the EPG' section at the beginning of this document).
13	348	At present the Standard does not describe the process for review and revalidation of the EPG (although here the Guideline states that it does). It is recommended that the EPG be reviewed and revalidated regularly (3 yearly) to reflect changing circumstances, costs and risks associated with the EPG scope activities. These provisions should be added to the Standard.
13	361	Paragraph 6 of the Guideline leaves it to the Applicant to use its discretion to determine the form of EPG. The Guideline (paragraphs 8 and 13) indicates that acceptable forms may include a self-guarantee and partial payments into a sinking

		fund. Giving Contractors discretion as to the form of EPG, while also allowing the option to provide guarantees that may depend on Contractor solvency will weaken the EPG requirement and its efficacy as a regulatory instrument.
13	369-375	It is STRONGLY recommended that the "self-guarantee or company guarantee" be removed from the list of allowed forms of guarantee. This option would appear to require no actual deposit with the ISA, and so it would not meet the requirements of the Standards, including the requirement to lodge the EPG with the ISA (as required by paragraph 5 of the Standard), or to implement the process of repayment or release of guarantee (paragraph 45-51) in a manner which is "uniform and non-discriminatory" as required by draft Regulation 26(7). Indeed, this option may favour certain types of Contractors (who can show financial backing from a wealthy sponsoring State, for example) above others, which may run counter to UNCLOS' stipulations on non-discriminatory treatment.
14	377-380	Insurance Policy or Scheme: The option for an insurance policy or scheme should also be deleted. Insurance is quite separate from a financial security or bond. Public liability insurance does not address costs of uninsurable harms, harms caused by planned activities; or harms resulting from a failure by the Contractor to act, for example due to deliberate non-compliance with a Plan of Work or supervening insolvency. These are all scenarios in which an EPG should be available to meet the cost of ensuring that the Plan of Work or project closure is properly implemented. It is also noted that the scope of insurance depends on the terms and conditions of the insurance policy, this introduces uncertainty and potential for loopholes which is not acceptable for an EPG.
14	382-389	Letter of Credit /Bank Guarantee: Paragraph 10, Lines 386-387, which describe the coverage for a letter of credit or bank guarantee, should refer to the EPG Scope.
14	390-396	Insurance Guarantee: The same observations made above with respect to paragraph 9 / lines 377-380 (Insurance Policy or Scheme) apply here. Further, the creditworthiness of the insurance company needs to be determined.
14	403-407	It is recommended that a maximum period be prescribed for a sinking fund, whereby a Contractor must have contributed the entire value of the EPG by a date no later than [3] years from the commencement of production.
15	418	Again, it is inappropriate to give the Contractor / application absolute discretion to select a form of EPG. Guidance should be given here to the LTC as to whether different forms of EPG are preferable over others (and the rationale), and consideration should be given to whether there are different circumstances which may call for selection of one form of EPG over another. Notably absent in the Standard and the Guideline are provisions outlining the LTC and Council's specific role, and the criteria they should use, in assessing and deciding upon the acceptability of the applicant / Contractor's proposed EPG form and amount.
15	422-433	Comments relating to Appendix 1, paragraph 21, lines 132-137, regarding the selection of a cost estimation tool, apply also to lines 422-433. The words 'suitable' and 'sufficient' are used, it is unclear who is responsible for determining such suitability and sufficiency (and against what criteria).

15	435-438	Comments relating to Appendix 1, paragraph 35, line 188, regarding coverage of non-contiguous mining areas, apply also to lines 435-438.
15	439	Paragraph 22 of the Guideline permits the LTC to address queries by the "seeking of additional information". The Standard and Guideline also need to include additional provisions and powers to ensure that the LTC and the Council do not recommend or approve any application until the LTC and Council can be satisfied, against set criteria, that a sufficient, complete, acceptable and irrevocable Guarantee will be in place. A decision point within the ISA appears to be absent from the EPG regime currently.
15	444	Comment relating to Appendix 1, paragraph 35, line 188 (that the ISA should be the entity responsible to issue the Guarantee Declaration, rather than the Contractor) applies also to Appendix 2, paragraph 22(n), line 444; and it is recommended that the wording be amended to indicate "the Commission may seek additional information from the Applicant prior to issuing a Guarantee Declaration".