The Ocean Foundation
RE: Draft Regulation 26
20 July 2023

Thank you, Mr. President, and very good morning, all.

On regulation 26, The Ocean Foundation supports the retention of the original section title and nomenclature “the Environmental Performance Guarantee” to ensure the spirit of this regulation remains focused on the ISA’s obligation to ensure the protection of the marine environment pursuant to Articles 145 and 192 of UNCLOS.

We strongly urge that the Environmental Performance Guarantee not be recharacterized as merely a “Decommissioning Bond” We echo Costa Rica’s comments that the purpose of the Environmental Performance Guarantee should not be only to provide funds in a situation where the Contractor could not meet its decommissioning and post-closure responsibilities. It is crucial that it also covers the costs for remediating an environmental incident whether it is caused or arises before, during or after the completion of the Exploitation activities or Contract term.

The well established purpose of a Guarantee in the project finance context is to provide a source of credit support that can be drawn upon in the event the primary obligor (here, the Contractor) fails to uphold its obligations under the relevant Contract, such as via bankruptcy or insolvency. Under the ISA’s draft Form Contract, the Contractor is held liable for the “actual amount of any damage, including damage to the Marine Environment, arising out of its wrongful acts or omissions”... “regardless of whether it is caused or arises before, during or after the completion of the Exploitation activities or Contract term.”

Consider a scenario where damage is caused by a Contractor to the Marine Environment prior to the expiry of the Contract term, the Contractor declares Bankruptcy or is otherwise insolvent, and the Contractor’s insurance does not cover the full costs of remediating the damage. In such a scenario, the Environmental Performance Guarantee should be a source of funds for the necessary environmental remediation, and thus its scope should not be limited merely to decommissioning and post-closure monitoring activities.

Following, in section 1, The Environmental Performance Guarantee should be paid prior to any exploitation activities, not just “production”. Damage to the seabed and ecosystem can be caused by pre- production site surveys, test mining, etc.

The Environmental Performance Guarantee must further outlast the contract, since environmental restoration/ remediation obligations may go on for decades after closure. Lastly where an Environmental Performance Guarantee is drawn upon, whether in full or in part, the Contractor should be obligated to fund the Guarantee back to the full required amount.

Lastly, in regards to sections 3, 4, and 5 regarding the amount of the Environmental Performance Guarantee, we support retaining the language “The Council shall decide the amount of an Environmental Performance Guarantee in Standard taking into account the recommendation of the Commission and Finance Committee,” and find that removing such phrasing would move the authority of determining the amount to the contractor, allowing, as seen in sections 4 and 5, the contractor to calculate and recalculate the amount of the Guarantee.

The Contractor should not have the right to unilaterally recalculate the amount of the

Environmental Performance Guarantee that it is obligated to provide – this should be the exclusive right of the Council to determine, otherwise, such action undermines the whole purpose of the guarantee. The regulated should not be the regulators. Retaining the language of section 3 would ensure adequate checks and balances.

Thank you