

**TEMPLATE FOR SUBMISSION OF TEXTUAL PROPOSALS DURING THE 29TH SESSION:
COUNCIL - PART II**

Please fill out one form for each textual proposal which your delegation(s) wish(es) to amend, add or delete and send to council@isa.org.jm.

1. Name(s) of Delegation(s) making the proposal:

The Pew Charitable Trusts

2. Please indicate the relevant provision to which the textual proposal refers.

Draft regulation 26

3. Kindly provide the proposed amendments to the regulation or standard or guideline in the text box below, using the “track changes” function in Microsoft Word. Please only reproduce the parts of the text that are being amended or deleted.

1. A Contractor shall lodge an Environmental Performance Guarantee in favour of the Authority and no later than 30 days before the commencement date of ~~Commercial P~~roduction in the Mining Area.

2. The required form and amount of the Environmental Performance Guarantee shall be ~~[assessed and recommended by the Commission and]~~ determined ~~[by the Council]~~ at the time ~~the Council approves the Plan of Work for Exploitation~~ according to the applicable Standards and take ~~into consideration~~ ~~account of the applicable~~ Guidelines, and shall reflect the forecasted costs required for:
(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 implementation of the Contractor's Closure Plan- and Emergency Response and Contingency Plan.~~

3. The amount of an Environmental Performance Guarantee may be provided by way of instalments over a specified period ~~but no later than 30 days before the commencement date of~~ Commercial Production in the Mining Area.

Move 3bis to Standard not Guideline as indicated by the suspense document

4. The amount of the Environmental Performance Guarantee shall be reviewed and updated ~~[every five years]~~ [annually by the Contractor];

(a) Where the Closure Plan is updated in accordance with these Regulations; ~~or~~

(b) As the result of:

(i) A performance assessment under Regulation 52;

(ii) A modification of a Plan of Work under Regulation 57; or

(iii) A review of activities under a Plan of Work under Regulation 58;

~~[(iv) [After consultation with a Contractor,] [The Authority considers that the likely cost of the activities outlined in (2) have substantially increased;] and~~

(c) At the time of review by the Commission of a Final Closure Plan under Regulation 60.;

(d) At each renewal of the Exploitation Contract;

Formatted: Font: Not Italic

- (e) Any time that the Environmental Performance Guarantee, or any part of it, is used or drawn upon, and
(f) At least every [five] years to consider whether the likely cost of the activities outlined in (2) have substantially increased, taking into account inflation and other market or economic conditions that may impact the amount of the Environmental Performance Guarantee that must be held.
~~(d) Inflation and other market or economic conditions impact on the amount of the guarantee that must be held.~~
6. The Authority shall hold such guarantee in accordance with its policies and procedures, which shall provide for:
- (a) The repayment or release of any Environmental Performance Guarantee, or part thereof, upon compliance by the Contractor of its obligations that are the subject of the Environmental Performance Guarantee; ~~or~~
- (b) The forfeiture of any Environmental Performance Guarantee, or part thereof, where the Contractor fails to comply with such obligations. And
(c) The replenishment of any Environmental Performance Guarantee, or part thereof, by the Contractor should the Authority need to make recourse to the Environmental Performance Guarantee.

Formatted: Normal (Web), Indent: Left: 2.06 cm

4. Please indicate the rationale for the proposal. [150-word limit]

In general, we believe there is an open policy question remaining to be settled by Council before this text can be completed: about whether the EPG should be restricted to closure activities (as currently drafted) or whether it should apply more widely to any situation in which the ISA could be left with liabilities, due to contractor action or inaction. The latter appeared to be the preferred approach of at least five Council members (and other member States also), judging from their responses to the ISA's 2020 stakeholder consultation on the draft Standard and Guidelines for EPG. The rationale is that the EPG would (like a bond) serve to incentivise and secure the performance by the Contractor of *all* 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 any failure by the Contractor properly to perform the Plan of Work or any emergency arising mid-contract. This would also seem consistent with the Exploration Regulations, which state that 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.*” [Nodules Regulations reg. 34(8), Sulphide Regulations reg. 35(8); Crusts Regulations reg. 35(8)].

If Council takes a policy decision that the EPG should be able to be used for emergency procedures which go beyond closure, this could be addressed in paragraph (2) of DR26, by adding new sub-paragraphs incorporating, for example, delivery of the Emergency Response and Contingency Plan. In any case, we agree with Australia that the scope of the EPG should be compared with the scope of insurance to ensure that there are no potential gaps in coverage.

Turning to DR26 as currently envisioned, in paragraph (1), we suggest the timeframe for lodging of the EPG should be ‘*no later than 30 days before the commencement of Commercial Production*’ to allow the ISA sufficient time to confirm receipt and check that the lodgement meets relevant requirements.

Paragraph (2) is silent as to *when* the assessment and determination of the form and amount of the EPG will take place. We suggest this should take place *at the time the Council approves the Plan of Work for Exploitation*, as the conditions of the EPG needs to be clear at the outset and incorporated into the Plan of Work as a condition of the Contract.

In paragraph (2), we believe that sub-paragraphs (a) (b) and (c) can be replaced simply by the wording: ‘*the implementation of the Contractor's Closure Plan*’. The Closure Plan includes within its scope all post-Commercial Production obligations of the Contractor. this includes: decommissioning, removal of equipment, post-closure monitoring etc. So these items do not need repeating as if they fall outside of the Closure plan. Indeed the term ‘post-closure’ should be avoided in the regulations. The monitoring post-Commercial Production falls within the definition of Closure, not after it. The Closure Plan also should be implemented whenever Commercial Production ends (even if ‘premature’). So there is no need to make separate provision for mid-contract unexpected closure.

For paragraph 3, we are fine with installments as long as it is clear that the full EPG must be lodged 30 days prior to commencement of commercial production (pursuant to paragraph 1).

We request the content of (3)(bis) , now in the Suspense Document, either be retained in the regulations, as mentioned by the African Group, or be placed in a Standard, not a Guideline - as it is intended to be a legally binding aspect of the EPG regime.

In paragraph (4), we do not support deletion of sub-paragraph (d). It seems sensible to factor inflation into the checks on the EPG amount, bearing in mind the potentially decades-long contracts in question. We believe such a consideration could be done during the five year review currently proposed.

We would also propose that paragraph (4) includes two additional trigger points for review of the EPG amount, namely

- “(e) At each renewal of an Exploitation Contract; and*
- (f) Any time that the Environmental Performance Guarantee, or any part of it, is used or drawn upon by the Authority.”*

We consider paragraph (6) should also cover replenishment by the Contractor in cases where the EPG is diminished.