

**TEMPLATE FOR SUBMISSION OF TEXTUAL PROPOSALS DURING THE 28<sup>TH</sup>  
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](mailto:council@isa.org.jm).*

**1. Name of Working Group:**

President's Text

**2. Name(s) of Delegation(s) making the proposal:**

The Pew Charitable Trusts

**3. Please indicate the relevant provision to which the textual proposal refers.**

DR 26

**4. 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] [a Decommissioning Bond] in favour of the Authority and no later than [30] days before the commencement date of production in the Mining Area.
2. The required form and amount of the [Environmental Performance Guarantee] [Decommissioning Bond] shall be determined according to the [applicable Standards and take account of the applicable] Guideline, and shall reflect the maximum [likely] [forecasted] costs required for:
  - (b) The implementation of the Contractor's Closure Plan 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. The implementation of the Emergency Response and Contingency Plan pursuant to Regulation 33, or otherwise.
  - (d) The delivery of the Contractor's Environmental Management and Monitoring Plan
  - (e) Remediating or compensating any environmental damages arising from Contractor activities that were not predicted and permitted in the Plan of Work, on the basis of the principle that whoever produces pollution should cover the costs their pollution imposes on others.
3. [The Council shall decide the amount and form of an Environmental Performance Guarantee at the time it considers the application for a Plan of Work for Exploitation according to the relevant Standard taking into account the recommendation of the Commission and Finance Committee. ~~The Council shall decide the amount of an [Environmental Performance Guarantee] [Decommissioning Bond] in the Standard taking into account the recommendation of the Commission and Finance Committee.~~ The amount of an [Environmental Performance Guarantee] [Decommissioning Bond] may be provided by way of instalments over a specified period according to the relevant ~~[Standard and take account of the applicable] Guidelines.~~
- 4 (e) At each renewal of an exploitation contract.
5. A Contractor shall, as a result of any review under paragraph 4 above, recalculate the amount of the [Environmental Performance Guarantee] [Decommissioning Bond] within 60 Days of a review date [submit

this calculation to the Secretary General for forwarding to the Commission and Finance Committee for their review]. The Council shall, taking into account the recommendations of the Commission and Finance Committee, determine the amount and form of a revised Environmental Performance Guarantee, which the Contractor shall then ~~and lodge a revised guarantee~~ in favour of the Authority by a date notified.

6 (a) The retention of the Environmental Performance Guarantee for the necessary duration, in line with these Regulations;

(c) The use of the Environmental Performance Guarantee or part thereof by the Authority either directly or via a third-party, to cover the costs arising as a result of the Contractor's failure to comply with such obligations.

(d) Payments by the Contractor to return the Environmental Performance Guarantee to its original amount if the Environmental Performance Guarantee is used by the Authority.

~~7. \_\_\_\_\_ The requirement for an [Environmental Performance Guarantee] [Decommissioning Bond] under this regulation shall be applied in a uniform [and non-discriminatory] manner.~~

## **6. Please indicate the rationale for the proposal. [150-word limit]**

As a general comment, we note the President's approach, in DR26, to restrict the use of the Environmental Performance Guarantee (EPG) only for closure matters. We note that this departs from arguments raised by, inter alia, Argentina, Australia, Costa Rica, EU, Federated States of Micronesia, Italy, Mexico, in responses to the ISA's 2020 stakeholder consultation on draft Standard and Guidelines for EPG. It seems sensible that a more appropriate, risk-based approach would be for the EPG to cover any situation in which the ISA could be left to cover costs of damages, due to contractor action (or inaction)s. The EPG can then also serve a similar function to a bonds: 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 default of the Contractor or its failure properly to perform the Plan of Work.

One example would be emergency situations. Indeed, we note, that a sole focus on closure activities for the EPG, would not be 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.” (see Nodules Reg. 34(8), Sulphides Reg. 35(8); Cobalt Crusts Reg. 35(8)).

We would certainly welcome in this regard an open discussion by negotiating parties as to the relative merits and implications of an EPG being tied only to closure, or being tied more widely to other contractor obligations. This seems like an important policy decision, that should benefit from more discussion by Council.

In paragraph (2), as the Closure Plan includes within its scope the Contractor's obligations with regards decommissioning, removal of equipment, post-closure monitoring etc. we suggest that the wording in sub-paragraphs (b) and (c) can be streamlined.

We also suggest including the Emergency Response and Contingency Plan, and possibly also the EMMP, and/or a wider Polluter Pays principle provision, depending on the outcome of the policy decision by Council with regard to the breadth of focus of the EPG.

On para 3, we agree with the facilitator that the Commission should make its recommendation to the Council on the amount of the EPG, however, ultimately the Council should decide whether that recommendation is sufficient. The 1994 Agreement provides that ‘Decisions by [...] the Council having financial [...] implications shall be based on the recommendations of the Finance Committee.’ The amount of the EPG seems like a decision having financial implications, in which case the Finance Committee's recommendation may also be added to this paragraph (3).

At the end of para 4, we suggest adding a provision so that the EPG is reviewed at the point of renewal of an exploitation contract.

Regarding para 5, the ISA should recalculate the bond on review, not just the Contractor. This is important to retain control over any revisions to the EPG type and amount that the Council originally approved. We suggest that the LTC, in consultation with the Finance Committee, would be best-placed to perform this function and that the Council should then make a decision on the basis of recommendations from those two technical bodies.

We recommend additions in paragraph (6) regarding rules for retention, use and replenishment of the EPG, to ensure the relevant procedures contain sufficient detail about how the ISA may hold and/or use the EPG.

All Regulations should be applied to relevant subjects in a uniform and non-discriminatory manner (as is proposed in DR1). Expressly requiring that certain Regulations should be applied uniformly, may unhelpfully suggest that other Regulations should not. Hence we suggest deleting paragraph (7).