



Template for the review of the draft standards and guidelines associated with the Draft regulations on exploitation of mineral resources in the Area

I. Background

1. The Draft regulations on exploitation of mineral resources in the Area ([ISBA/25/C/WP.1](#)) require that certain issues are addressed in accordance with, or taking into account, standards and guidelines to be developed by the organs of the Authority. The standards will be adopted by the Council and will be legally binding on Contractors and the Authority, whereas the guidelines will be issued by the Legal and Technical Commission or the Secretary-General and will be recommendatory in nature.
2. Stakeholders consultations are an integral part of the process decided upon by the Commission for the development of the standards and guidelines ([ISBA/25/C/19/Add.1](#)).
3. The Legal and Technical Commission will consider the comments received through the stakeholders consultation at its next session.
4. The drafts include a cover page containing substantive background and contextual information on the approach taken by the Commission in developing each standard and guidelines. Review comments are not being sought on this background information.
5. Issues of format and consistency across the standards and guidelines will be reviewed by the secretariat and Commission once the content of the various standards and guidelines is finalized following stakeholders consultations.

II. Submitting Comments

6. To ensure that your comments are given due consideration, please send them by e-mail to ola@isa.org.jm, at your earliest convenience but **no later than the date announced on the ISA website for the relevant draft standards and guidelines**.
7. When submitting comments, please adhere to the following guidance as much as possible:
 - a. Please provide all comments in writing and in an MS Word .doc or .docx format using the table provided below.
 - b. The table format allows for an unlimited number of comments to be added. To add more comments, you may add more rows.

- c. Please provide full contact information for the individual/Government/organization submitting the comments.
 - d. Please avoid commenting on issues related to format, grammar, spelling or punctuation, unless it affects the overall meaning of the text, as the document will be formatted and edited when the final draft is prepared.
 - e. To facilitate the revision process please be as specific as possible in your comments. In areas where you feel additional or alternative text or information is required, please suggest what this text may look like or what information should be included.
 - f. Text may be copied from the draft into the table if stakeholders wish to use "track changes" in editing text (this is encouraged to ensure accuracy and avoid numbering errors).
 - g. If you refer to additional sources of information, please include these with your comments when possible or provide a complete reference or hyperlink.
 - h. All review comments will be posted on the ISA website, unless otherwise requested by the submitting entity.
8. Should you have any questions regarding the review process, please contact ola@isa.org.jm.

III. Template for Comments

- 9. Please use the review template below when providing comments.
- 10. Line and page numbers have been provided in the drafts. Please use these as a reference as illustrated in the table below.

TEMPLATE FOR COMMENTS

<i>Document reviewed</i>	
Title of the draft being reviewed:	Draft standard and guidelines on the form and calculation of an Environmental Performance Guarantee developed by the Legal and Technical Commission
<i>Contact information</i>	
Surname:	Williams
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General Comments

UKSR has been an active and supportive participant throughout the development of the draft Exploitation Code and supporting instruments, not least because of the open, collaborative and transparent approach taken by the Authority and Commission, including through workshops and stakeholder consultations.

This draft appears to be an exception to the Authority’s generally high levels of transparency and stakeholder engagement. We do not see how it fits into the prioritization output from the Pretoria Workshop in 2019, nor how it interacts with the broader environmental liability regime including insurance requirements and the “Trust Fund”. All of these draft guidelines should be considered together, and in the context of the overall fiscal regime.

Specific Comments

Page	Line	Comment
1	37	As “management of residual mining effects” is not further defined in the draft regulations, this document needs to provide additional guidance on the scope of each of the terms in this phrase for the purposes of the Guarantee. For example, how far in spatial and temporal terms does “residual” extend? To what order of “effects” (first, second, third, ad infinitum) is “management” expected to be applied? What is the point of distinction between this requirement and the scope of the Environmental Trust Fund?
4	89-90	<p>UKSR is perplexed by the wording of paragraphs 11 and 12. For example, the description of the Regulation’s requirement being to cover “unexpected costs, expenses and liabilities” appears to contradict the plain language of the Regulation: “likely costs, expenses and liabilities”. In business, anything “likely” is to be expected. If they can be anticipated, and modelled, and calculated, such as the proposed Guarantee, they cannot be said to be “unexpected”.</p> <p>We therefore suggest replacing:-</p> <p>“11. The Guarantee is required to cover unexpected costs, expenses and liabilities that a Contractor is unable to meet that fall within the EPG Scope.</p> <p>12. The Guarantee is 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 damage.”</p> <p>With:-</p> <p>“11. The Guarantee is required to cover costs, expenses and liabilities that fall within the EPG Scope.</p>

		<p>12. The Guarantee is not to cover costs, expenses and liabilities that do not fall within the EPG Scope, such as operating costs associated with a Contractor’s Environmental Management & Monitoring Plan during the life of the Exploitation Contract.</p> <p>13. The Guarantee is not to cover costs, expenses and liabilities incurred as a result of tortious liability for environmental damage.”</p>
4	132-137	<p>The combination of “greatest reasonably credible costs” and estimation on the basis of a “worst case scenario” is not consistent with the Exploitation Regulation’s requirement to provide sufficient Guarantee to meet “<u>likely</u> costs”. Any upper-end credible estimate for a worst-case scenario must, by definition, be <u>unlikely</u> and represented by a very small subset of potential mine-closure scenarios, which themselves should be subject to risk mitigation measures. Furthermore, requiring a contractor to maintain a Guarantee sufficient to cover “worst case” scenarios strongly incentivizes contractors against investing in mitigating against those identified scenarios. Again, we perceive a risk of overlap here with the Environmental Liability Trust Fund.</p>
5	154-161	<p>Independent validation of methodology and calculation is reliant on there existing suitably qualified third-party experts, but it is not certain at this point that such experts exist, or will exist at the point at which an EPG would be required under the draft Guideline.</p> <p>Furthermore, it is UKSR’s view that it would not be appropriate for the Authority or the Commission to outsource its responsibility to a third party, even if suitably qualified on these questions. We, therefore, suggest that further guidance would be required from the Authority on both methodology and calculation.</p>
7	245	<p>The draft Standard and Guideline does not clearly account for the most likely scenario in which Contractors progressively close and decommission sections of the mining area as exploitation is completed, and operations move on to different areas. At any one time, some subset of the overall mine plan will be “open” and thus requiring a Guarantee for its closure and decommissioning. In addition, as post-closure monitoring in decommissioned mining areas progresses through the life of the contract, residual effects will become much better understood, and the Guarantee may need to adjust to accommodate this new knowledge. UKSR would encourage this to be covered in Section VI of the draft Standard.</p>
12	360-407	<p>While UKSR welcomes the flexibility in form of the Guarantee set forth in the guidelines, it is unclear that the consequences of the Self-Guarantee option are appreciated by the Authority or Commission. For example, the Self-Guarantee potentially distorts competition among the contractors, and further disadvantages the commercial contractors, particularly those with smaller balance sheets.</p>

