

THE PEW CHARITABLE TRUST'S COMMENTARY

***ON THE REVISED CONSOLIDATED TEXT: DRAFT REGULATIONS ON
EXPLOITATION OF MINERAL RESOURCES IN THE AREA,
DATED 29 NOVEMBER 2024 (ISBA/30/C/CRP.1)***

Key

Black font, **red font**, and grey text-boxes are replicated from the Draft Regulations text.

Blue font represents commentary or edits proposed by The Pew Charitable Trusts.

Regulation 104

Power to take remedial action

1. Where a Contractor fails to take action required under Regulation 103, the Authority:

(a) Shall notify the sponsoring State and coordinate with relevant officials of that State on further action that may be taken to enforce compliance by the Contractor; and

(b) May carry out any remedial works or take such measures as it considers reasonably necessary to prevent or Mitigate the effects or potential effects of a Contractor's failure to comply with the terms and conditions of an Exploitation Contract. The Council shall, ~~[after consultation with the Contractor] [and sponsoring State] [and]~~ [based on the recommendations of the Commission], determine the nature of such works or measures and the manner in which they are to be carried out.

2. If the Authority takes remedial action or measures under paragraph 1 (b) above, the ~~[actual and reasonable]~~ costs and expenses incurred by the Authority in taking that action are a debt due to the Authority from the Contractor and, to the extent it is liable, the sponsoring State, and may be recovered from the Environmental Performance Guarantee lodged by the Contractor.

We suggest two drafting amendments to **paragraph (1)'s chapeau**:

- Firstly, change 'fails to take action' to 'fails to take sufficient action'. This is to avoid the ISA being unable to use DR104 where a Contractor can claim they took some action (even if that action did not achieve the aim).
- Add the phrase 'in addition to the steps set out in DR103(5)' towards the end of the chapeau. This is to clarify that the remedial works and recovery cost can run alongside, and is not instead of, the additional regulatory action the Council may take against a non-compliant Contractor towards suspension or contract termination.

We support the addition of **sub-paragraph (1)(a)**. Failure by a Contractor to remedy a breach upon receipt of a Compliance Notice from the ISA seems an appropriate situation for the State to take enforcement action under its national administrative and judicial processes. The State will have access and powers within national jurisdiction that are not available to the ISA. Also, whilst the ISA can recover costs, it cannot hold a perpetrator to account, or bar them from future roles that would enable repeat issues, and the national court is likely to be the best forum for affected third parties to receive justice.

We support the addition at the end of **paragraph (2)** to ensure the ISA can use the Environmental Performance Guarantee to cover costs it may incur taking its own remedial action, this being the primary purpose of the EPG.