

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 15

### **Commission's recommendation for the approval or disapproval of a Plan of Work**

1. If the Commission determines that the application and the applicant meet the criteria set out in Regulation 13, it shall recommend approval of the Plan of Work to the Council.

[1. Alt. The Commission may recommend approval of a proposed Plan of Work if the Plan of Work complies with all requirements stipulated in Regulation 13, and the Commission has sufficient information to determine that all requirements in Regulation 13 have been met.]

1. bis. The Commission shall provide with any recommendation for approval made under paragraph 1:

- (a) a report in accordance with Regulation 11(5);
- (b) a summary of the deliberations of the Commission including what inputs have been taken into account and how these have been assessed, as well as divergences of opinion in the Commission, if any;
- (c) bis a summary of any uncertainties inherent in the Plan of Work and how the applicant has proposed to address these;
- (d) any conditions the Commission considers appropriate to deal with adverse effects of the proposed activities; and

2. The Commission shall not recommend approval of a proposed Plan of Work if:

- (a) the Plan of Work does not comply with all requirements stipulated in Regulation 13 and Regulation 12(4);
- (b) part or all of the area covered by the proposed Plan of Work is included in:
  - (i) A Plan of Work for Exploration approved by the Council for the same Resource category for a different qualified applicant and for which the Council has decided to maintain the operator's preference and priority in accordance with Article 10 of Annex III;
  - (ii) A Plan of Work approved by the Council for Exploration or Exploitation of other Resources if the proposed Plan of Work would be likely to cause undue interference with activities under such approved Plan of Work for other Resources;

- (iii) An area disapproved for Exploitation by the Council pursuant to Article 162(2)(x) of the Convention; or
- (iv) an Area of Particular Environmental Interest or any other protected site disapproved for exploitation by the Council [or in respect of which the Council has set a spatial or temporal protective measure as indicated in the applicable Regional Environmental Management Plan];
- (v) A Reserved Area or an area designated by the Council to be a Reserved Area, except in the case of eligible applications under these Regulations made in respect of a Reserved Area;
- (vi) An area that has not been subject to prior Exploration activities;
- (vii) An area not covered by a Regional Environmental Management Plan.

(c) Bis Such approval would undermine or contradict the binding goals, objectives or measures set out in other global frameworks and agreements related to the protection of the Marine Environment;

[(d) There is inadequate environmental baseline information for the area covered by the proposed Plan of Work.]

2. bis. The Commission shall not recommend approval of a proposed Plan of Work if the applicant, or its predecessor in law previously violated the general obligations of Contractors in a non-negligible way.

3. The Commission shall not recommend the approval of a proposed Plan of Work if it determines that:

(a) Such approval would permit a State party or entities sponsored by it to Monopolize the conduct of activities in the Area with regard to the Resource category in the proposed Plan of Work in accordance with applicable Standards, taking into consideration Guidelines; or

(b) The total area allocated to a Contractor under any approved Plan of Work would exceed:

- (i) 75,000 square kilometres in the case of polymetallic nodules;
- (ii) 2,500 square kilometres in the case of polymetallic sulphides; or
- (iii) 1,000 square kilometres in the case of cobalt-rich ferromanganese crusts; or

4. If the Commission determines that it will not recommend approval of the Plan of Work pursuant to paragraphs (1)-(3) it shall inform the applicant in writing, providing the reasons for this determination, and shall provide the applicant with a further opportunity to make representations within 90 Days of the date of notification to the applicant. During this period the Commission shall not make a recommendation to the Council on the application.

5. At its next available meeting, the Commission shall consider any such representations made by the applicant when preparing its reports and recommendations to the Council, provided that the representations have been circulated at least 30 Days in advance of that meeting.

#### **Comment**

Several proposals were made to this draft regulation, resulting in a considerable amount of edits. A clean text is proposed which aims to accommodate and reconcile the proposals, while retaining some of the alternative wordings on which delegations diverged.

Generally, DR15 is shaping up well, though we have a few important suggestions for improvement – as set out below.

We prefer **paragraph (1 alt). Sufficiency of information** is a crucial aspect of responsible decision-making in general, and a key concern in particular in the data-poor environments that the plans of work will cover. Whether (1) or (1 alt) is used, it needs to reflect the exemptions to approval that follow in DR 16(2) and (2 bis). Otherwise DR16 immediately conflicts with itself. This could be achieved simply through this formulation:

*“Subject to the other provisions of this regulation 16, if the Commission determines that the application and the applicant meet the criteria set out in regulation 13, it [shall][may] recommend approval of the Plan of Work to the Council.”*

We would prefer the provision to read ‘may’ not ‘shall’, to allow the LTC (and the Council) to retain a general discretion to approve or disapprove the Plan of Work based on their assessment, and to avoid any pathway for automatic approval. (However, if the other regulations in this part, once settled, contain sufficiently clear and comprehensive procedural requirements and criteria to enable a recommendation of disapproval where appropriate, ‘shall’ could be used).

Whilst we support **paragraph (1 bis)** generally, its cross-reference to the report prepared under DR11(5) reiterates for us the oddity that this report would relate to the Environmental Plans only. Is there another requirement for a report that explains how the LTC has assessed the application holistically including the Mining Plan, Finance Plan, Training Plan, Maritime Security Plan, Emergency Response Plan etc? If so, where is it, and why would the LTC be producing two separate but overlapping reports? Again, we recommend that DR11(5) is widened to **cover the application as a whole**, to ensure this essential part of the regime – where the LTC reports and explains its recommendations on the application for a Plan of Work to the Council – is not flawed.

We also recall two proposals made by Portugal during the March 2024 session that we do not see reflected in this revised text but think should be, namely:

- (i) The LTC’s report must expressly include a **list of Stakeholders** consulted, and explanation as to how and why their comments were taken into account (or not) in the LTC’s assessment and recommendation; and
- (ii) A prohibition on LTC members who are nationals of the sponsoring State to an application from participating in the LTC’s review, recommendation and report on that application, to avoid **conflicts of interest** (or perception of such conflict).

**Paragraph (2)** cross-refers to DR12(4). DR12(4) sets out the information the LTC should take into account in its evaluation of the Plan of Work. We agree that DR12(4) should be followed before the Council can approve a Plan of Work. But we believe the **Council should be satisfied that all aspects of the application procedure** have been adhered to before approving a Plan of Work, not only 12(4). For example if the procedures required for coastal States notification and consultation, for preference and priority, or for stakeholder consultation, etc. have not been followed, then there is a serious procedural defect and the Council should not approve the application (but should request the procedural defects to be remedied, before the application and LTC recommendation comes back to the Council).

With regards to **paragraph (2)(b)(v)** relating to **reserved areas**, we reiterate our comments in relation to DR8, which recommend that DR8 should set out clear eligibility criteria for reserved areas, so that there are clear criteria that can be applied under DR15. Such eligibility criteria should reflect and operationalise:

- Article 9 of Annex III to UNCLOS, which stipulates that a plan of work for a reserved area can only be considered if the Enterprise has taken a prior decision not to carry out activities in that reserved area, and if the applicant is a developing State or sponsored by a developing State; and
- Section 2(5) of the Annex to the 1994 Agreement, which adds that an application for a reserved area is also permitted where the applicant is the contractor who contributed the original reserved area, and the Enterprise has independently functioned for 15 years without submitting an application for the reserved area; but only where the applicant offers to include the Enterprise as a joint venture partner.

Provided DR13(9)(c)(i)’s criterion for **adequate baseline data** is retained, then we agree that **paragraph (2)(d)** of this DR15 can be deleted as duplicative of the same point.

We had previously suggested that the LTC should be expressly tasked in paragraph (2) to indicate a **recommended initial term for the contract**, to avoid the maximum term being issued by default and without due thought each time, in case a shorter term may be the best way to achieve the ISA's various objectives. Whilst it would be the Council's decision, we consider the Council would find it useful to have a technical recommendation from the LTC on contract length.

Paragraphs **(4) and (5)** of DR15 give the applicant a further opportunity to make representations where the LTC is minded not to recommend approval of their application. We consider this is duplicative of DR14, and can be deleted. We note that the applicant would already have had the following opportunities to make representations or add information for the LTC to consider:

- The original application (DR5).
- If the original application is preliminarily assessed as incomplete (DR10).
- After a consultation period and initial comments from the LTC (DR11(1)).
- After another round of comments from the LTC (DR11(3 quat)).
- At the LTC's request at any time prior to making their recommendation (DR14)

We do not think an additional **sixth opportunity for application amendment** is necessary. We also note that the earlier opportunities listed above include transparency and consultation provisions, which are worrying absent from this proposed process in DR15(4) and (5). It would not serve the ISA well if the rules enable a secret exchange between the LTC and an applicant, at the last-minute, to change the LTC's recommendation from refusal to approval.