

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.

Section 3

Safety, labour and health at sea

Regulation 29 ~~ter~~ quater

Risk reduction principles

1. [Harm or danger of harm to people, the marine environment or material assets shall be prevented or limited in accordance with the Regulations and any applicable Standards, and taking into consideration the Guidelines.] The Contractor shall ~~work to further~~ reduce the risk of accidents, incidents and other hazards as much as reasonably practicable, to the point where the cost of further risk reduction would be grossly disproportionate to the benefits of such reduction.
2. The reasonable practicability of risk reduction measures shall be kept under review in the light of new knowledge and technology developments and Good Industry Practice, Best Available Techniques and Best Environmental Practices. In assessing whether the time, cost and effort would be grossly disproportionate to the benefits of further reducing the risk, consideration shall be given to best practice risk levels compatible with the operations being conducted.
3. A Contractor shall maintain the necessary risk assessment and risk management systems in accordance with Good Industry Practice, Best Available Techniques and Best Environmental Practices and shall report annually to the Secretary-General on such systems in accordance with Regulation 38(2)(h).

Comments

- It has been pointed out by some delegations that further discussions are needed in respect of the wording of in particular the first sentence of paragraph 1 in respect of the allocation of obligations. Furthermore, it has been pointed out that more clarification is needed since the reference to incidents have been stroke out.
- It has been suggested to reinstate the reference to “*grossly*”.

In terms of substance, we consider that DR29quater should be strengthened to clarify a **position of zero tolerance for human fatalities and unlawful environmental harm**. As the regulation is currently drafted, it appears that some degree of limited risk or harm to human life or the environment remains acceptable. We do not consider that an appropriate policy for the Council to adopt. As noted previously by Council delegates (e.g. Norway and Germany), and with reference to Articles 145 and 146 of UNCLOS, reducing risk of harm to the environment and human life should not be a ‘cost benefit’ exercise. In support of this, we also note the trend in terrestrial mining to work to a standard of ‘zero harm’. This is accepted by major industry players (see, for example: <https://www.icmm.com/en-gb/stories/2022/zero-harm-only-acceptable-target>) and the ISA should expect the same standard from any actor, private sector or otherwise, who wishes to engage in activities in the Area.

In terms of drafting, we agree that DR29quater needs amendment to clarify that this regulation is setting a duty to prevent harm, and reduce risk, upon the Contractor.

We note that **paragraph (1)** includes two separate obligations. The first sentence is an obligation *of result*: Contractors must prevent or reduce adverse outcomes, The second sentence is an obligation *of conduct*: Contractors must employ risk reduction to avoid events that may cause adverse outcomes. We consider that both aspects are needed, and **should be phrased as an active and allocated duty** i.e. ‘*The Contractor shall...*’ They could be separated into different paragraphs, better to differentiate the two.

Other drafting notes for paragraph (1) include:

- We believe that ‘marine environment’ should be capitalised.
- We suggest that ‘people’ could be replaced with the wording ‘*human life and health*’. This would reflect better the terminology used in UNCLOS (Art 146) and other international agreements and processes that relate to human health (e.g. multilateral environmental agreements, human rights conventions, labour rights treaties, World Health Organisation processes).
- The wording ‘*in accordance with the Regulations and any applicable Standards, and taking into consideration the Guidelines*’ risks undermining the intended function of DR29quater. It reads as if DR29quater is not actually setting an obligation to reduce risk / harm, but is rather referring to another regulation or instrument that may do this (but which does not currently exist – thus imposing no obligations on Contractors). We suggest to amend so that the paragraph reads ‘**including** *in accordance with the Regulations and any applicable Standards, and taking into consideration the Guidelines*’,
- We support reinsertion of ‘grossly’, which we believe was deleted in the 2024 draft of the regulations text only in error.

Paragraph (2) suffers the same problem of using passive voice and failing to identify the responsible actor. Such drafting hinders the regulation’s enforceability. As with paragraph (1), redrafting is needed (‘*The Contractor shall...*’).