

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 33

Preventing and responding to Incidents

1. The Contractor shall [suspend Exploitation activities and follow the procedures set forth in Regulation 29 bis] ~~[not proceed or continue with Exploitation]~~ if it is reasonably foreseeable that proceeding or continuing would cause or contribute to an Incident, [or reduce] or prevent the effective management of ~~such an~~ Incident.

[1.bis. A Contractor shall maintain an Incident Register on board any mining vessel or Installation.]

2. The Contractor shall, upon becoming aware of an Incident:

- (a) Notify its Sponsoring State or States, [States adjacent to the Contract Area likely to be affected] and the Secretary-General ~~[without undue delay]~~ [at the earliest time possible immediately, but no later than 24 hours] ~~from the moment the Contractor becomes aware of the Incident;~~

- (b) Immediately implement, where applicable, the Emergency Response and Contingency Plan approved by the Authority for responding to the Incident;

- (c) Undertake promptly, and within such time frame as stipulated, any instructions received from the Secretary-General in consultation with the Sponsoring State or States, flag State, [States adjacent to the Contract Area likely to be affected] or relevant international organizations, as the case may be;

- (d) Take any other measures necessary in the circumstances to limit the adverse effects of the Incident;

- (e) Record the Incident in the Incidents Register, ~~[which is a register to be maintained by the Contractor on board a mining vessel or Installation to record any Incidents or notifiable events under Regulation 34];~~ and

- (f) Following resolution of an Incident, provide the [Secretary-General and its Sponsoring State or States] with an Incident report which details the Incident and any corresponding data on its nature, scale, and impacts, the Contractor's response, [findings] ~~[and lessons learned]~~ [and any proposed measures to minimise or reduce the risk of similar Incidents occurring in the future].

3. The Secretary-General shall promptly report any Contractor that fails to comply with this Regulation to its Sponsoring State or States, [States adjacent to the Contract Area likely to be affected] and the flag State of any vessel involved in the Incident for consideration of the institution of legal proceedings under national law.

~~[4. The Secretary-General shall report such Incidents and measures taken to the Commission and the Council at their next available meeting, [and publish a copy of the Incident report at the Authority's website].]~~ [4. bis. Alt. The Secretary-General shall:

(a) before issuing instructions under this regulation, request instruction from the Compliance Committee, and consult with the Sponsoring State or State, and other relevant State or international organisations, insofar as it is feasible to do so taking account of the urgency in the situation;

(b) follow any relevant Standards and Guidelines on the issue of instructions under these regulations;

(c) report such Incidents and measures taken to the Commission and the Council at their next available meeting.

5. The Secretary-General shall publish copies of Incident reports on~~at~~ the Authority's website, [subject to ensuring that confidential information is protected].

Comments

- The definition of “*Incident*” have, upon request by several delegations, been updated in the Schedule.
- In paragraph 2(a) it has been proposed to re-insert language on adjacent coastal States in order to reflect the clear interest of such States in knowing about incidents, as well as to ensure consistency with paragraph 3.
- It has been suggested by a delegation to continue the negotiations based on paragraph 4. bis. Alt. It has also been suggested that paragraph 5 should be retained as it is interrelated to paragraph 4. bis. Alt.

It is crucial that the **definition of ‘Incident’** is clear, and appropriate to triggering DR33’s urgent and extreme response. We do not think this is yet achieved in the draft Regulations. The Schedule currently defines ‘Incident’ as *“an event, or sequence of events, where activities in the Area result in: (a) A marine Incident or a marine casualty as defined in the Code of International Standards and Recommended Practices for a Safety Investigation into a Marine Casualty or Marine Incident (Casualty Investigation Code, effective 1 January 2010); (b) A significant unanticipated or unpermitted adverse impact to the Marine Environment or to other existing legitimate sea uses, whether accidental or not, or a situation in which such adverse impact was only narrowly avoided is a reasonably foreseeable consequence of the situation; and/or (c) Damage to a submarine cable or pipeline, or any Installation.”*

We are concerned that the cross-reference to the Casualty Investigation Code 2010 (accessible here [https://wwwcdn.imo.org/localresources/en/OurWork/MSAS/Documents/Res.MSC.255\(84\)CasualtyInvestigationCode.pdf](https://wwwcdn.imo.org/localresources/en/OurWork/MSAS/Documents/Res.MSC.255(84)CasualtyInvestigationCode.pdf)) obscures the definition rather than clarifies it. Upon closer examination, we see that the Code only covers events that have occurred *‘directly in connection with the operations of a ship’*, which we understand should fall within the flag State’s jurisdiction over shipping operations but not the ISA’s. Perversely, that *‘operations of a ship’* terminology also potentially excludes the deep seabed mining operations under the ISA’s jurisdiction that these Regulations are designed to cover. The Code definition also includes issues that may not be sufficiently impactful to necessitate triggering of the Emergency Response and Contingency Plan and the ISA’s urgent response, notification of coastal States etc. e.g. injury to a member of the ship’s crew. We therefore suggest that the Council should include a more comprehensive definition for ‘Incident’ in the Regulations, tailored to activities in the Area - rather than cross-referencing to this other document.

In relation to the drafting of DR33, we generally support the edits made in this version, and offer the following additional comments:

- We consider it would be appropriate for the Contractor to be responsible for notification about an Incident to the SG and to States with which the Contractor has a direct relationship (i.e. the sponsoring State(s), and the flag State where relevant). But we think it would be more appropriate to place **responsibility upon the SG (and not the Contractor) for notification to other States** i.e. to adjacent coastal States, or other States with potentially affected interests (e.g. whose marine use is being affected), or other international organisations with relevant competence.
- The language in **sub-paragraph (2)(a)** appears muddled (*‘at the earliest time possible immediately, but no later than 24 hours’*). We suggest using just *‘immediately’*.

- **Sub-paragraph 2(b)** can be simplified by deleting “*approved by the Authority for responding to the Incident*”. The wording “*where applicable*” implies that the contractor may have discretion to determine that the circumstances do not warrant application of the Emergency Response and Contingency Plan. We do not believe this is the intention. We suggest amending to read “*as applicable*” so it is clearer that this sub-paragraph means that the relevant *part* of the Plan should be applied, which may vary depending on the nature of the emergency).
- We suggest that **paragraph (2)(d)** include a reasonableness parameter, to incorporate other relevant interests and issues and industry practices, rather than relying solely on the Contractor doing what they consider “necessary” to salvage the situation from their own perspective. This would then read: “*all other measures necessary and reasonable in the circumstances*”.
- We suggest adding at the end of **paragraph (3)** a requirement for the SG also to report the Contractor’s failure to manage the Incident to the Compliance Committee, for consideration of compliance action. Indeed, perhaps every Incident should be referred to the Compliance Committee? This is required for Notifiable Events in DR34, though these are less serious scenarios than Incidents.