

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.

Part IV

Protection and Preservation of the Marine Environment

Section 1

Obligations relating to the Marine Environment

Regulation 44

General Obligations

1. The Authority, Sponsoring States, the Enterprise, Contractors, flag States and ~~{port States}~~ [and the States of registry] ~~of or having authority over installations, structures, robots, and other devices~~ ~~{where they are members of the Authority}~~ shall take necessary measures to ensure effective Protection of the Marine Environment from harmful effects which may arise ~~{directly or indirectly}~~ from the Exploitation ~~in the Area~~, in accordance with Regulations as well as applicable Standards and [the relevant Regional Environmental Management Plan], taking into consideration the Guidelines referred to in Regulation 45 ~~and the relevant Regional Environmental Management Plan~~ and to this end shall ~~, as applicable in their respective areas of competence:~~

(a) Apply the precautionary [principle or precautionary] approach. [as appropriate];

(a) bis ~~Apply and~~ an Ecosystem-based ~~Approach to~~ ~~{the assessment management and prevention of risk of harm}~~ ~~{in order to prevent and reduce of risk of harm}~~ ~~{avoidance of risk of harm}~~ ~~{the prevention, assessment and management of risk of harm}~~ ~~to the Marine Environment from Exploitation in the Area;~~

(b) ~~Apply the Best Available Techniques and~~ Best Environmental Practices ~~{and ensure the availability of sufficient information};~~

(c) Apply scientific-based approach and integrate use the Best Available Science and Scientific Information;

(c) bis Ensure the availability of sufficient science and scientific information for the purpose of decision-making;

(c) ter Use and ~~{where available,~~ relevant traditional knowledge of Indigenous Peoples and of local communities ~~}~~ in decision-making. where available;

(d) Ensure accountability and transparency in the assessment, evaluation and management of Environmental Effects and risks ~~from Exploitation in the Area,~~ [including but not limited to ~~stakeholder consultation and~~ public access to environmental information. public participation, and access to justice;]

~~(c) Apply the polluter pays principle [approach] [having due regard to the public interest];~~

~~[(e) Alt. Take into account the approach that the polluter should bear the cost of pollution, endeavour to promote practices whereby those engaged in Exploitation activities bear the cost of meeting the pollution prevention and control requirements for the authorized activities, having due regard to the public interest;]~~

[(f) Elaborate and implement measures to ensure that ~~damage or hazards~~ [harmful changes] to the ~~M~~marine ~~E~~nvironment are not transferred, ~~[directly or indirectly,]~~ from one area ~~of the environment~~ to another or from one type of pollution into another one [and to prevent, reduce and control interference with the ecological balance of the marine environment]. Special attention should be paid to avoiding toxic, persistent and bio accumulative substances; and]

~~[(g) Apply the Mitigation hierarchy to avoid, minimize, mitigate, and should it become feasible in the future, remediate and restore the Marine Environment from harm caused by activities in the Area.]~~

[(h) Ensure ~~that Exploitation in the Area under an Exploitation Contract is carried out with~~ reasonable regard for climate change mitigation and ~~to minimise impact on avoidance of impacts on~~ the ocean's capacity to function as a climate carbon sink.]

[(i) Apply the mitigation hierarchy to avoid, minimize, mitigate, and, should it become feasible in the future, remediate and restore the Marine Environment from harm caused by activities in the Area];

2. The Commission shall make recommendations ~~{to the Council}~~ on the implementation of paragraph 1 as required.

3. No ~~Regulation in this Part thing in these Regulations~~ shall be interpreted as preventing ~~[sponsoring]~~ States from applying environmental or other laws and regulations, or [Parties], the Enterprise and Contractors from taking, ~~individually or jointly, more stringent~~ measures that are more stringent than those in the rules, regulations and procedures of the Authority relating to the protection of in accordance with international law with respect to the prevention, reduction and where practicable elimination of detrimental effects on the Marine Environment.

[4. Exploitation in the Area and obligations relating to the Marine Environment shall be interpreted and applied in a manner that does not undermine relevant legal instruments and frameworks and relevant global, regional, subregional and sectoral bodies and that promotes coherence and coordination with those instruments, frameworks and bodies.]

Comments

- There seems to be divergent views on the entities that should be referenced in the chapeau of paragraph 1. It is thus necessary to consider which entities should be referenced here.
- Many delegations have proposed to delete the reference to “*directly or indirectly*” in the chapeau, as this reference is redundant.
- Several delegations have suggested to revise this draft regulation to better align with other international instruments and frameworks, including the recently adopted BBNJ Agreement, and this has been attempted throughout this draft regulation.
- In para (1)(b), the reference to “*Best Available Techniques*” have been deleted since this is included in the definition of “*Best Environmental Practices*”
- One delegation has proposed to insert a new paragraph 4, which has the intention to mirror the language of Article 5(2) of the BBNJ Agreement.
- There are ongoing discussions on whether a mitigation hierarchy should be included in this general regulation or in a specific regulation. The feasibility of certain stages of the mitigation hierarchy needs to be discussed and applied uniformly across the Regulations.

As a general comment on DR44, we find ourselves **confused about its purpose**. UNCLOS already requires States and the ISA to take necessary measures to ensure effective protection for the marine environment from harmful effects which may arise from Contractors' activities. The Regulations are such measures. Repeating the obligation to have measures, in a measure, seems odd. If the intention is to place binding obligations upon Contractors who are not bound directly by UNCLOS, then DR44 needs phrasing differently and the obligations would be better placed in Part III (e.g. DR18 bis on 'Obligations of Contractors'). If the intention is to flesh out to States and the ISA how to implement this obligation of UNCLOS, it would seem better achieved by ensuring the relevant principles are incorporated in practice throughout these Regulations, so fulfilment of the Regulations is all that is required. Otherwise the expectations are unclear. E.g. How does a State 'apply the polluter pays principle' in addition to and separately from the way that the regulations establish the obligations, sanctions, procedures and liability mechanisms for environmental harm?

The inter-relation between this DR44 and DR2 is also unclear to us. We see significant overlap, with the same principles often described in different ways. Please see below for some examples. We believe the purpose and content of DR44 **requires further thought to avoid redundancy or duplication**.

	DR2	DR44
Purpose	Principles to guide the application of the Exploitation Regulations	Obligations when taking measures to protect the Marine Environment from harmful effects of Exploitation.
To whom applied	Anyone interpreting or applying the Regulations (e.g. the ISA, States, the Enterprise, Contractors)	The ISA, States, the Enterprise, Contractors.
Cross-references	DR13(7)(b) - Assessment of Plan of Work	DR13(9)(b) - Assessment of Plan of Work
	DR63 - Incentives	n/a
	DR107(1 Alt)(c) - Review of these Regulations	DR107(1 Alt)(c) - Review of these Regulations
Precautionary Principle	Precautionary principle or precautionary approach as appropriate.	Apply the precautionary [principle or precautionary] approach, [as appropriate].
Ecosystem Approach	Ecosystem approach. An integrated approach to ocean management.	Apply an Ecosystem-based Approach to the assessment management and prevention of risk of harm [in order to prevent and reduce of risk of harm] [avoidance of risk of harm][the prevention, assessment and management of risk of harm] to the Marine Environment from Exploitation in the Area.
Best Environmental Practices	N/A	Apply the Best Available Techniques and Best Environmental Practices [and ensure the availability of sufficient information];
Polluter Pays Principle	Polluter pays principle	Apply the polluter pays principle [approach] [having due regard to the public interest]. Alt. Take into account the approach that the polluter should bear the cost of pollution, endeavour to promote practices whereby those engaged in Exploitation activities bear the cost of meeting the pollution prevention and control requirements for the authorized activities, having due regard to the public interest;]
No Transboundary Harm Principle	N/A	Elaborate and implement measures to ensure that damage or hazards [harmful changes] to the Marine Environment are not transferred, [directly or indirectly,] from one area of the environment to another or from one type of pollution into another one [and to prevent, reduce and control interference with the ecological balance of the marine environment]. Special attention should be paid to avoiding toxic, persistent and bio accumulative substances.
Transparency and Public Participation	Open access to non-confidential data, and information.	Ensure accountability and transparency in the assessment, evaluation and management of Environmental Effects and risks from Exploitation in the Area; [including but not

	Transparency in decision-making, including effective stakeholder involvement and public participation.	limited to stakeholder consultation and public access to environmental information, public participation, and access to justice
Best Available Scientific Information	The use of the scientific methods taking into account the Best Available Scientific Information, as defined by the Council.	Apply scientific-based approach and integrate use the Best Available Science and Scientific Information. Ensure the availability of sufficient science and scientific information for the purpose of decision-making;
Traditional Knowledge	The use of relevant traditional knowledge of Indigenous Peoples and local communities where available.]	Use and [where available, relevant traditional knowledge of Indigenous Peoples and of local communities] in decision-making, where available.

In terms of drafting, throughout this section of the Regulations, we suggest that consideration be given to whether the different **defined terms of ‘Environmental Impacts’ and ‘Environmental Effects’** are used correctly throughout the text, noting that they have specific and different meanings, both of which are important to ISA decision-making – impacts being the immediate physical or chemical changes that activities may cause - and action (e.g. animals crushed, substrate removed); effects being the consequences of those impacts in the Marine Environment - a result (e.g. fauna mortality, habitat loss, species extinction).

Regarding **paragraph (1)** of DR44, we prefer deletion of the wording “*referred to in Regulation 45*”, as was also supported by Costa Rica, Ghana on behalf of the African Group, and Russia. Not only do the Standards and/or Guidelines referred to in DR45 apply to this regulation, they may also be produced pursuant to DR 94 (‘Adoption of Standards’) and DR95 (‘Issue of Guidelines’).

In **sub-paragraph (1)(a)**, the term ‘the ecosystem-based approach’ is used, but we note this term has been removed as a defined term from the Schedule to the Regulations. We are unsure why. The Suspense Document holds the proposals that had previously been made for that definition (which we support), labelled ‘reinserted if needed’. We think reinsertion is needed, to ensure all parties interpret the term consistently – given the wide-reach of DR44. Terminology should also be made consistent, within the regulations as we note the reference to the slightly different terms ‘Ecosystem approach’ and ‘integrated approach to ocean management’ in DR2.

In **sub-paragraph (b)** we propose retaining the term ‘Best Available Techniques – as now defined in the Schedule and different from (and not captured by) the defined term ‘Best Environmental Practices’. We support the reference to **sufficiency of information**. This is an important criterion to understand confidence levels in the information on which decisions are being taken. This consideration becomes paramount in situations of significant scientific uncertainty (as is the current situation with deep-seabed mining) where precaution must apply. We note that sufficient information requirements have been developed in other international regimes and consider that the Regulations would benefit from further definition and application of information sufficiency requirements. We recall DOSI’s note in this regard <https://www.dosi-project.org/wp-content/uploads/sufficient-information-policy-brief.pdf>.

Sub-paragraph (c) may not be necessary if ‘Best Available Scientific Information’ is covered in the defined term ‘Best Environmental Practices’ (in sub-paragraph (b)).

We support in principle the current formulation and retention of **sub-paragraph (d)**, the clear reference to the polluter pays principle in **sub-paragraph (e)**, and inclusion of **sub-paragraph 1(f)** and its adherence to the wording of UNCLOS Article 195. With regards the latter, we would recommend providing for Standards in relation to toxic, persistent and bio-accumulative substances - so as not to leave it as a subjective determination from Contractor to Contractor what materials would fall within those categories. A Standard could cross-refer to existing lists that have been developed by other multilateral agreements e.g. the Basel, Stockholm and Rotterdam Conventions.

Sub-paragraphs (g) and (i) contain redundant and potentially inconsistent wording. Either sub-paragraph should be replaced by use of the defined term ‘Mitigate’ with a capital M. Or deleted altogether (with the word ‘Mitigate’ added instead to sub-paragraph (a)).

We support sub-paragraph (h) in relation to climate mitigation and support the replacement of climate sink with carbon sink, but query whether ‘reasonable regard’ is an accurate reflection of the legally binding obligations of States in

relation to climate change mitigation? We would suggest that the precise wording of this sub-paragraph be reconsidered in light of the advisory opinions of ITLOS (May 2024)¹ and of the ICJ (due 2025) on the topic

We strongly support paragraph (3) as currently formulated, as well as the new paragraph (4). Though the latter provision (about not undermining other multilateral legal instruments) could be broadened to apply to implementation of the Regulations generally, and moved to DR2.

1

https://www.itlos.org/fileadmin/itlos/documents/cases/31/Advisory_Opinion/C31_Adv_Op_21.05.2024_orig.pdf