

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 48 ter

Test Mining

1. Subject to this Regulation, [an **A**pplicant **[or] a Contractor**] shall conduct Test Mining [prior to submitting an application for a Plan of Work for Exploitation]/[before starting any commercial mining under an Exploitation Contract]. Information gathered through Test Mining shall be compiled in a Test Mining report in accordance with Annex IV, be in accordance with the [applicable] Standard and [taking into consideration] Guidelines [and shall inform on the application for a Plan of Work for Exploitation in particular with regard to the protection of the environment].

2. ~~"Test mining" means an *in situ* testing of the integrated system of all equipment and [all related] process steps ([e.g. including collector, raiser and release techniques] for Exploitation [activities] in a Contract Area under [appropriate] [such] technical, spatial and temporal conditions which [allows the "Test Mining" for the provision of] [provides] evidence to support the information provided by an applicant in its application for a Plan of Work for Exploitation, and to assist the Commission [and the Council] in its evaluation of the application [against the criteria contained in Regulation 13 and 15.] [to demonstrate that the proposed mining equipment is technically and operationally appropriate, and that assumptions regarding impacts on the Marine Environment is effectively protected from harmful effects, can be validated. Data collected during test mining can be used to validate numerical models and predict cumulative effects, in accordance with Article 145 of the Convention. "Test mining" should also be undertaken in order to optimize the integrated system with regard to its potential effects on the Marine Environment.]~~

[2. ~~bis~~ The purpose of the Test-Mining is to validate that the proposed mining equipment is technically appropriate and the effects of the **Exploitation** activity, in particular with regard to the Protection of the environment, **[do not harm the marine environment and]** operates as described in the Environmental Impact Statement/Plan of Work.]

3. Test Mining in the Area requires a prior approval by the [Commission] and shall be carried out with reasonable regard for other activities in the Marine Environment, in accordance with Articles ~~87 and~~ 147 of the Convention, and in accordance with the applicable Standards and taking into consideration the Guidelines and Recommendations [issued by the Commission under the Exploration Regulations], in particular to ensure that the Marine Environment is effectively protected from [harmful effects]/[**Serious Harm**], including the cumulative effects, in accordance with Article 145 of the Convention.

4. Test Mining does not have to be undertaken if the [information] pursuant to paragraph [2] has been provided through other Test Mining undertaken by the **A**pplicant, **[Contractor]**, by other contractors, or in the context of another approved Plan

of Work for Exploration or Exploitation. Where the Applicant or [Contractor] relies on such information it shall compile the information in its Test Mining report and explain why this information is sufficient evidence for the purpose of paragraph [2]. The Commission shall, in its review of an [application] [request] assess whether the information provided by the applicant in the Test Mining report pursuant to paragraph 1 above is sufficient to demonstrate compliance with the requirements set out in paragraph [2] above and report to the Council pursuant to Regulations 11-15.

5. [Before commercial mining may commence in accordance with Regulation 25], a validation monitoring system shall be established by the Contractor, in line with the Environmental Management and Monitoring Plan, in order to monitor whether the requirements of the Plan of Work are complied with. In case of non-compliance, Regulation 52 will apply.

6. Any gains from Mineral resources which have been collected during Test Mining shall be paid to the Environmental Compensation Fund, as established by Regulation 54. [To this and prior to the commencement of Commercial Production, a Contractor shall provide the Secretary-General with a Test Mining royalties report containing the information specified in the applicable Standards and Guidelines in respect of any minerals collected during Test Mining. Royalties in respect of mineral resources that have been collected during Test Mining shall be paid at the time the Contractor makes its first payment or royalties after the date it commences Commercial Production.]

7. If a Material Change has been determined in accordance with Regulation 25 and 57 (2), the Commission shall consider and determine whether and on which aspects any additional Test Mining may have to be undertaken in order to provide sufficient information to satisfy the requirements of paragraph [2] above. In this case, paragraphs 1 and 3 above apply.

8. After the Test Mining, the Contractor shall submit to the Commission a TtestMmining report. The Test Mining report shall provide information on the findings from the Ttest-Mmining, in accordance with the Standards and taking into consideration the Guidelines. The Ttest-Mmining report shall provide the Commission with sufficient information to review the results in light of the Environmental Impact Statement/Plan of Work.

9. The Commission shall, without undue delay, review the findings of the TtestMmining study in light of the Environmental Impact Statement/Plan of Work. If the findings of the Test Mining are in accordance with the Environmental Impact Statement/Plan of Work, the Commission shall notify the Contractor, and the Contractor may commence Commercial Production in accordance with the Exploitation Contract.

Comments

- In paragraph 1, “*prior to submitting an application*” is placed in square brackets, as a proposal has also been received to replace it with “*before starting any commercial mining under an Exploitation Contract*”.
- The definition of Test Mining in paragraph 2, has been placed in the Schedule.
- In paragraph 3, it is suggested to change the reference to effectively protecting the Marine Environment against “*harmful effects*” to protecting it against “*serious harm*”. It is proposed to keep the original wording (“*harmful effects*”) as it covers a broader term, but it is currently placed in square brackets.
- For the first part of the twenty-ninth session, the Intersessional Working Group on Test Mining provided a report on the current status of the work of the intersessional work: [Report on intersessional outcomes](#), which was followed up with a [report of 4 July 2024](#) summarizing the main discussions taking part in the period from March to July 2024.
- Please also see alternative resolution in draft regulation 48 ter. Alt. below.

We thank Germany and Belgium for hosting the recent **workshop in Bremen** for furthering the intersessional group’s collective understanding.

Pew remains of the view that Test Mining should be undertaken during the exploration phase of operations. From a legal perspective, this is consistent with UNCLOS Annex 3, Article 17, which states that “*exploration should be of sufficient duration ...for the design and construction of mining equipment...for the purposes of testing mining*”. Practically this will give greater confidence to the ISA in evaluating an application that Contractors will be able to meet both their economic and environmental obligations and is consistent with a precautionary approach necessary for a novel industry, with outstanding and untested monitoring, control and enforcement mechanisms.

Accordingly, we continue to propose a different approach to DR48ter’s proposal. Whilst we agree with the proposal to move the definition of test mining provided in **paragraph (2)** to the Schedule of the Regulations (although note that these definitions need some work), we suggest that test mining data is included as a specific requirement of the EIA and EIS (via DRs 47 and 48, or simply via the EIS template in Annex IV). Test mining results can then inform the ISA’s evaluation of the application for a Plan of Work for Exploitation. Such test mining information will be particularly invaluable at that stage, not only in increasing the data confidence of the EIS, but also in informing the LTC’s assessment of the applicant’s technical capabilities as well as their abilities to ensure effective protection of the Marine Environment. Standards can set out more detail for what specifically is required to constitute valid and adequate test mining.

With this approach, the ‘prior approval’ intended by paragraph (3) is covered by the rules and approval processes for EIAs for test mining, under the Exploration Regulations. Though in this regard, we reiterate our strong recommendation that those rules for EIA under Exploration require urgent strengthening. Please see here this report of the Code Project, for more detail: https://www.pewtrusts.org/-/media/assets/2023/03/cp-eia-2023_02032023_cp.pdf

If our suggested approach to test mining is adopted, then this DR48 ter can be deleted, with relevant insertions being placed in the Schedule and in the Regulations and Annex relating to EIA and EIS instead, as indicated above. We do also support the intention of paragraph (5), to have a period of validation monitoring after Contract commencement but before Commercial Production and for the Contractor to report on this to the ISA, either to confirm the original Plan of Work remains valid or to apply for a modification under DR57 before full-scale mining commences. But we think this should be incorporated into DR 25 (‘Documents to be submitted prior to production’), not here. In fact, such validation monitoring report should in our view replace the reference to the ‘Feasibility Study’ currently in DR25(1) whose purpose and content is unclear to us. We see some overlap with this concept and China’s proposal for Pilot mining in **DR 48 ter. Alt.** (below) which appears in the submission to have been suggested as a complementary process to test mining rather than an alternative, so we wonder whether DR 48 ter alt, should in fact be **DR 48 quater** (“China proposes to distinguish between the Test Mining and Pilot Mining”).

As a general drafting point, the use of ‘/’ to denote potential options, such as between ‘harmful effects/serious harm’ in para 3; or EIS/Plan of Work in paras 8 and 9 are inappropriate for regulatory language. Substantively speaking we note that ‘**Serious Harm**’ is not the threshold for effective protection, so ‘harmful effects’ should be sufficient.

We welcome moving the definition from **paragraph (2)** to the **Schedule**, though note that in doing some wording was possibility omitted, and from a syntactical point are not sure that a definition should include the term being described in its description, we do not support the second alt definition in the schedule, and would caution that any definition would need to be sufficiently broad to capture future technologies, but without opening loopholes.

Regulation 48 ter. Alt.

Pilot Mining

- 1. Subject to this Regulation, a Contractor shall conduct “Pilot Mining” before starting any Commercial Production under an Exploitation Contract. Information gathered through Pilot Mining shall be compiled in a Pilot Mining report in accordance with the applicable Standard and taking into consideration the Guidelines.**
- 2. Pilot Mining is conducted by a Contractor in its preparation for commencement of Commercial Production, and to assist the Commission in its evaluation of the Feasibility Study.**

3. The purpose of the Pilot Mining is to validate that the proposed mining equipment is commercially and technically appropriate and the effects of the activity, in particular with regard to the Protection of the environment, operates as described in the Environmental Impact Statement/Plan of Work.
4. Pilot Mining in the Area requires a prior approval by the Commission and shall be carried out with reasonable regard for other activities in the Marine Environment, in accordance with Articles 87 and 147 of the Convention, and in accordance with the applicable Standard and taking into consideration the Guidelines, in particular to ensure effective protection for the marine environment from harmful effects in accordance with Article 145 of the Convention.
5. Any gains from Mineral resources which have been collected during Pilot Mining shall be paid to the Environmental Compensation Fund, as established by Regulation 54.
6. If a Material Change has been determined in accordance with Regulation 25 and 57 (2), the Council shall determine whether and on which aspects any additional Pilot Mining may have to be undertaken based on the recommendations of the Commission in order to provide sufficient information to satisfy the requirements of paragraph 2 above. In this case, paragraphs 1 and 3 above apply.
7. After the Pilot Mining, the Contractor shall submit to the Commission a Pilot Mining report. The Pilot Mining report shall provide information on the findings from the Pilot Mining, in accordance with the Standards and taking into consideration the Guidelines. The Pilot Mining report shall provide the Commission with required information to review the findings in light of the Environmental Impact Statement/Plan of Work. The Commission shall, without undue delay, review the findings of the Pilot Mining study and make recommendations to the Council.
8. The Council shall, without undue delay, consider the findings of the Pilot Mining study in light of the Environmental Impact Statement/Plan of Work based on the recommendation of the Commission. If the findings of the Pilot Mining are in accordance with the Environmental Impact Statement/Plan of Work, the Council shall make an affirmative decision and notify the Contractor through the Secretary-General. Thereafter, the Contractor may commence Commercial Production in accordance with the Exploitation Contract.]

Comment

It has been suggested to insert an alternative draft regulation concerning pilot mining, instead of draft regulation 48 ter. This draft regulation proposes a framework for the preparatory phase after the signing of the Exploitation Contract and before the commencement of the Commercial Production.