

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 VI

Closure plans

Regulation 59

Closure Plan

1. A Contractor shall develop a Closure Plan for the Mining Area, in accordance with Regulation 7(3) and 93 bis, Annex VIII to these Regulations, and [consistent with] other Environmental Plans of the Contractor, as well as Standards, [the applicable Regional Environmental Management Plan], and taking into consideration the Guidelines.

1.bis The objectives of a Closure Plan are to ensure that:

(a) The marine environment is effectively protected from environmental harm;

(b) The marine environment, human health and safety are ensured during Closure [or any temporary suspension] of Exploitation activities;

[(c) the Marine Environment will have a clear and healthy status following the end of Exploitation;]

(d) The adverse Environmental Effects arising from Closure are Mitigated;

(e) Remaining Environmental Effects continue to be monitored, [managed, including remediation, restoration and rehabilitation] and reported for the period prescribed in the Closure Plan; and

[(f) The Mining Area is returned, where [the Contractor in consultation with the Commission determines it to be technically feasible, to a condition resembling its premining condition through active Restoration. Where active Restoration is determined to not be feasible, the Mining Area is rehabilitated, to the extent it is technically feasible to facilitate passive Restoration.]

2. In developing the Closure Plan, the Contractor shall, in accordance with the requirements of Annex VIII, set out the responsibilities and actions of a Contractor during any temporary suspension, and also for the Decommissioning and Closure of activities in a Mining Area, including the post-closure management and monitoring of remaining Environmental Effects. In fulfilling these responsibilities, the Contractor shall, *inter alia*:

(a) Undertake activities and the scheduling of studies, based on available baseline data, to inform about Closure before and throughout Exploitation;

(a) bis Undertake a gap analysis of existing environmental data to determine if additional information and/or surveys will be required;

- (a) ter Utilise [Good] Industry Practice and Best Environmental Practices;
- (b) Set a date of cessation or suspension of Exploitation, at which point a management and monitoring plan must also be in place for the period prescribed in the Closure Plan and in accordance with the applicable Standards and taking into consideration the Guidelines and results obtained in previous monitoring activities;
- (b) bis Undertake timely discussions with the [Authority] so that [the Authority is duly informed of] the likely timing of Closure;
- (c) Final environmental condition of the area, including the state of remaining [resources, the oceanographic, geological, biological, socioeconomic and sociocultural condition, and ensure the risks relating to residual Environmental Effects are identified, quantified, assessed and managed in accordance with Best Available Scientific Information, Best Available Techniques and Best Environmental Practices, which includes the gathering of information relevant to Closure or suspension;
- (d) Comply with health and safety requirements related to Closure activities;
- (e) Report [to the Authority] on the identification, monitoring, and quantification of significant remaining Environmental Effects [to the Authority], including data to inform about recovery or lack thereof, over a period established in the Closure Plan, and [that necessary] management responses are implemented in a timely manner, including plans for further surveys, data collection, Mitigation, or remediation where appropriate in accordance with the applicable Standard and taking into account the Guidelines;
- (f) Make and fulfil required disposal, Restoration and Rehabilitation commitments in accordance with the [applicable] Standards and taking into consideration the Guidelines;
- (f) bis Remove completely any Installations and equipment, or parts therefrom, from the Mining Area with any kind of waste abandonment explicitly prohibited. The Closure Plan should include an assessment of options leading to the identification of the Contractor's preferred Decommissioning solution for Installations and equipment, as well as parts therefrom; and
- (g) Ensure that the Exploitation activities are closed or suspended efficiently and safely.

2. bis The Contractor shall [ensure] transparency during the Closure process and in fulfilling these responsibilities, the Contractor:

[(a) Shall consult with all States and Stakeholders in accordance with Regulation 93bis on the Closure Plan and any revisions as required under Regulation 57 before submission for approval; and

(b) During the development of the Closure Plan, shall engage with [potentially directly affected] Stakeholders, and in accordance with Regulation 93 ter, Standards, and taking into consideration the Guidelines, consult Stakeholders in the Closure Plan, design, review, and implementation.

3. A Contractor shall maintain and update its Closure Plan [on the basis of analysis of data and results obtained from implementation of the environmental monitoring and] in accordance with these Regulations, Good Industry Practice, Best Environmental Practices, [Best Available Techniques, Best Available Scientific Information] and the applicable Standards and taking into consideration the Guidelines.

[4.] In the five years preceding the planned end of the period of Exploitation, or any other period, the Closure Plan shall be updated [annually] and, if necessary, be updated and be finalized in accordance with Regulation 60(1). Details on the procedures of

review of the Closure Plan, including conditions requiring updates thereof, shall be further elaborated in the applicable Standards and taking into consideration the Guidelines.

5. If a revised Closure Plan is required, the Contractor shall demonstrate it has engaged with [potentially directly affected] Stakeholders, in accordance with Regulation 93 ter, the applicable Standards, and taking into consideration the Guidelines, in its preparation of the revised Closure Plan. The Contractor shall also demonstrate it has conducted consultation with States and Stakeholders regarding the revised Closure Plan in accordance with Regulation 93bis.]

[6. Provided that the procedure under Regulation 93bis has been completed, the Commission shall, at its next meeting, provided that the documentation has been circulated at least 30 Days before the meeting, examine the revised Closure Plan in the light of any submissions received on the revised Closure Plan in accordance with Regulation 93bis.]

Comment

Draft regulation 59 has been subject to significant discussions during the second part of the twenty-ninth session. Also, several written proposals have been provided. The discussions and proposals have been implemented to the extent possible and the draft regulation is presented in a clean version to ensure better clarity.

The **drafting of this version of DR59** is difficult to understand and needs significant work for this to be considered by the Council to adopt or enforce.

In terms of content, we think this **regulation should be stripped back** to cover:

- (a) a requirement for a Contractor to develop, maintain and implement its Closure Plan in accordance with the relevant Annex and Standard,
- (b) overarching objectives of a Closure Plan, and
- (c) a requirement for the Contractor to review and finalise the Closure plan prior to Closure.

More substantively, it seems that the **Council needs to agree conceptually what the objectives of Closure should be**, to progress drafting of this DR59. We think it should be about: safe removal of all equipment, reporting on the state of the environment at cessation of Commercial Production including information about any mineral resources not extracted, taking steps to achieve any environmental rehabilitation as may be feasible at that time, and long-term monitoring and reporting to the ISA in order to inform understanding over timescales of the environmental effects caused by the Exploitation, and any natural recovery. It would also be useful to understand **what Closure requirements are practical during a suspension; and whether it would be feasible or desirable to require progressive Closure** (of one part of a Contract Area, whilst others continue under Commercial Production)

We also see **need for a broader policy discussion on restoration and rehabilitation** (noting scientific advice that it is not possible, on current knowledge) and what level of commitment the ISA expects of Contractors, consistent with the environmental obligations set forth in UNCLOS. This will also be important to determine the appropriate amount for the environmental performance guarantee.

In terms of timing, the Closure Plan needs to be agreed and acceptable to the ISA, **at the outset and as a prerequisite to Contract award**. Whilst the Plan should be updated as significant new knowledge or technology comes in (and certainly re-examined for Best Environmental Practices immediately prior to implementation), the current vision in the regulations of continual updates seems onerous in practice. We would also strongly object to the idea that a Contract could be awarded based on a preliminary or place-holder Closure Plan – or one that aspires to future possibilities not yet available. The Closure commitments must be defined at the outset, so that they can be appropriately costed in the Financing plan, as required by Annex III(A)(d). If the Closure commitments are not satisfactory and achievable at application stage (and accompanied by a sufficient EPG), then the Contract must not be awarded

Here are examples of **drafting issues** that we find problematical in this new DR59 text:

- **Sub-paragraph (1 bis)(a)** is termed too broadly. The obligation should apply during Closure – not be open-ended. And a Contractor only has an obligation to protect the Marine Environment from harm arising from activities in the Area – not all harm. ‘Marine Environment’ should be capitalised.
- **Sub-paragraph (1 bis)(b)** asks a Contractor to ‘ensure... that the marine environment is ensured’, which makes no sense. This should be an obligation to ensure the effective protection of the Marine Environment and human health and safety from the harmful effects of activities in the Area. These crucial words are missing. This (b) also overlaps directly with sub-paragraph (1 bis)(a). They can be merged. ‘Marine Environment’ should be capitalised.
- **Sub-paragraph (1 bis)(c)** overlaps with sub-paragraph (1 bis)(f) and contains undefined and ambiguous wording that will be hard to enforce. Though we certainly agree with the proposal in principle, that the Closure Plan should include measurable and enforceable commitments by the Contractor to leave the Contract Area and surrounding environment in conditions that have been agreed in advance with the ISA.
- **Sub-paragraph (1 bis)(d)** overlaps with sub-paragraphs (1 bis)(a) and (b).
- **Paragraph (2)** begins with setting obligations for the development of the Closure Plan but then seems to switch in some places – without being clear about this – to setting obligations for the implementation of the Plan. (Sub-paragraph (f bis) seems to include both in one paragraph!) If our understanding is correct, then these different types of obligation should be separated into two separate paragraphs (and the obligations should be expressed more clearly).
- **Sub-paragraph (2)(a)(ter)** is redundant, as covered by DR18 bis (1 bis).
- **Sub-paragraph (2)(b)** erroneously refers to ‘Exploitation’. This renders the provision unworkable. Closure is included in the definition of Exploitation. Exploitation only ceases *after* Closure has been completed. ‘Exploitation’ cannot be suspended. This paragraph should instead refer to ‘Commercial Production’. The paragraph also refers to ‘a management and monitoring plan’ without explanation. Does this mean the Closure Plan? A part of the Closure Plan? Something else? The EMMP? It is hard to understand. We wonder if the sub-paragraph could in fact be deleted as unnecessary in any event. The Mining Workplan should set out the planned period of Commercial Production, and suspensions that may occur under these Regulations are a reaction to circumstances, not planned in advance.
- **Sub-paragraph (2)(c)** needs to begin with a verb to follow the chapeau and to have operative purpose. We think it might be ‘*Analyse and report to the Authority...*’ Though if we are right, this paragraph seems to overlap significantly with sub-paragraph (2)(e). Perhaps the purpose of sub-paragraph (2)(c) should be to require documentation of the environmental condition prior to commencement of Closure to serve as a baseline, whereas (2)(c) covers reporting during and at the end of Closure? This would make sense to us, but the drafting does not convey that clearly.
- **Sub-paragraph (2)(d)** is redundant, as covered by the general regulations pertaining to health and safety e.g. DR30. We believe this sub-paragraph (2)(f) could be deleted. The definition of ‘Closure’ and the Closure Plan requirements already include restoration and rehabilitation.
- **Sub-paragraph (2)(f)** refers to ‘disposal commitments’ – what are these? Disposal of what?
- **Sub-paragraph (2)(f bis)** mentions a prohibition of ‘*waste abandonment*’. The scope here is unclear (Abandonment of equipment? Dumping of waste? Both?). How does this relate to separate legal prohibitions on waste disposal under these Regulations (and/or under IMO Conventions, depending on the type of waste concerned)?
- **Sub-paragraph (2)(g)** erroneously refers to ‘Exploitation’. As above, this should be ‘Commercial Production’.
- **Paragraph (4)** sets a time limit but then adds ‘*or any other period*’ (and ‘*if necessary*’) seeming to immediately undermine the time limit (and undermine the requirement for a review and stakeholder consultation for the Closure Plan 24 months prior to cessation of Commercial Production in DR60(1)). We are also unclear how paragraph (4) aligns with DR57 regarding modification to a Plan of Work and DR58 regarding review of the Plan of Work.
- **Paragraph (5 bis)** overlaps with paragraph (2 bis). ‘Engage’ should be ‘engaged’.

On the positive side, we are pleased to see the defined term ‘Mitigation’ now used correctly in this regulation; removal of the term ‘post-closure’; the inclusion of sociocultural condition; and recognition that the Closure Plan needs also to cover suspensions.