May 15, 2015 – Via electronic mail to consultation@isa.org.jm

Report to Stakeholders (ISBA/Cons/2015/1)
International Seabed Authority
14-20 Port Royal Street
Kingston, Jamaica

Re: Response to request for comments on Report to Members of the Authority and all stakeholders in connection with Developing a Regulatory Framework for Mineral Exploitation in the Area.

Dear Members of the International Seabed Authority:

On behalf of Earthjustice, a public interest law firm based in the United States that works with numerous persons and organizations deeply concerned about the possible effects of seabed mining, we are pleased to provide these comments in response to your Report to Members of the Authority and all stakeholders as part of "Developing a Regulatory Framework for Mineral Exploitation in the Area." This letter supplements the letter we submitted on May 14, 2014. We attach a copy of that letter and incorporate it by reference as part of this letter.

As we noted in our May 14, 2014 letter, Earthjustice has been closely involved with the creation and implementation of environmental laws and regulations for more than 40 years. Throughout that time, our lawyers have represented the public in federal courts all across the United States, drafted legislation and regulations, and advocated for stewardship of the planet's resources in domestic and international forums. We employ experts in every major federal environmental discipline, including lawyers who specialize in environmental impact analysis, air and water quality, mining effects, and waste regulation and disposal. A more complete description of our work is at http://earthjustice.org/. As we did with our earlier letter, we focus this comment letter on the environmental aspects of the ISA's Report.

Introduction

At the outset, we reiterate our support for the commitment by the International Seabed Authority (ISA) to the protection of the marine environment from harmful effects of sea bed mining which the ISA has now included as one of its High level issues (Issue # 9). This commitment is both vital and required.

Many laws and governing regimes require the ISA to protect the environment as part of these exploitation regulations. These include Articles 145(b), 192, 194, and 196 of the United Nations Convention on the Law of the Sea (UNCLOS). They also include the 1992 Convention on Biological Diversity, The London Convention, and the London Protocol.

In addition, the ISA is required to follow the precautionary principle when formulating these regulations. This principle is articulated in Principle 15 of the 1992 Rio Declaration on Environment and Development. Its importance has been underscored by the Seabed Disputes Chamber of the International Tribunal for the Law of the Sea, which has emphasized that States have the legal obligation to apply the precautionary approach (set out in Principle 15 of the 1992 Rio Declaration on Environment and Development) and to take all appropriate measures "to prevent damage that might result from the activities of contractors that they sponsor." International Tribunal for the Law of the Sea: Case No. 17: *Responsibilities and Obligations of States Sponsoring Persons and Entities with Respect to Activities in the Area* (Request for Advisory Opinion submitted to the Seabed Disputes Chamber), 1 February 2011, ¶ 131. In so ruling, the Seabed Disputes Chamber explicitly stated that this obligation is applicable "even outside the scope of the [ISA] Regulations." *Id*. This ruling underscores the legal duty of the ISA to insist upon the application of precaution to prevent environmental damage in developing any exploitation regulatory regime.

In short, both the Convention and the Agreement Relating to the Implementation of Part XI of the Convention make clear that a central mission

of the ISA is to protect and preserve the marine environment. The ISA has endeavored to adhere to this requirement by mandating the use of best environmental practices and applying a precautionary approach in its regulations governing exploration in the Area. As the ISA now begins to formulate the Regulatory Framework for mineral exploitation and seabed mining, it must ensure that this fundamental requirement infuses every decision and action taken during the course of each exploitation regulatory proceeding.

With this over-arching precaution principle in mind, we provide several specific comments in response to certain key matters contained in the Report to Members of the Authority and all stakeholders, below, highlighting the need for development and robust implementation of:

- Environmental Impact Statement principles that should include a presumption against mining in any case where the baseline assessment discovers new and unique life forms, and
- The principle that the application process for possible mineral exploitation in the Area must be open to participation by observers and be transparent at all stages, consonant with Aarhus Convention principles.

Overview

The duty to ensure that the regulatory framework for mineral exploitation in the Area satisfies the legal requirement to protect and preserve the marine environment can most directly be met by the ISA with a robust, carefully designed approach to the following: (1) the application of precaution; (2) the preparation and review of environmental assessments; (3) the designation of protected areas; (4) the participation of observers; (5) the development of standards of operation; (6) the requirements to follow best environmental practices; (7) the establishment of mechanisms for monitoring and enforcement; and (8) the development of a means for funding any necessary protections, restoration, or remediation. At the same time, the ISA must ensure that its process for considering and deciding upon applications for seabed mining is open, transparent, and based on sound science and thorough environmental assessment.

Specific comments

Part II (page 12): Environmental Impact Statement (EIS)

The experience in the United States over the past four decades under its "National Environmental Policy Act" (NEPA) provides a good source of guidance to inform the preparation of environmental impact statements.

NEPA requires all federal agencies considering actions that could significantly affect the quality of the human environment to prepare either an environmental assessment (EA) or an environmental impact statement (EIS). 42 U.S.C. § 4332(2)(C). EISs must take a close look at the possible impacts of the action, including direct and indirect impacts and cumulative impacts, and must also analyze alternatives. *Id.*

The U.S. Council on Environmental Quality (CEQ) helps ensure that NEPA is implemented lawfully by federal agencies. CEQ regulations provide detailed guidance on numerous questions that have arisen in the agencies and in the federal courts over the past four decades. See 40 C.F.R. § 1500. The United States Supreme Court has ruled that these regulations are entitled to "substantial deference." *Andrus v. Sierra Club*, 442 U.S. 347, 358 (1979).

CEQ NEPA regulations and related case law provide guidance to that could help inform ISA's approach to setting the standards for environmental assessments. For example, the CEQ regulations define the term "cumulative impact" as "the impact on the environment which results from the incremental impact of the action when added to other past, present, and reasonably foreseeable future actions regardless of what agency (Federal or non-Federal) or person undertakes such other actions." 40 C.F.R. § 1508.7. Federal courts in the United States have held that a thorough consideration of cumulative impacts is required in the preparation of an EA. *See, e.g.*, *Kern v. U.S. Bureau of Land Management*, 284 F.3d 1062, 1075 (9th Cir. 2002). Specifically, an EA must provide a quantified assessment of project's environmental impacts when combined with other projects. *Great Basin Mine Watch v. Hankins*, 456 F.3d 955, 972 (9th Cir. 2006). Moreover, courts interpreting NEPA have made clear that agencies cannot avoid the duty to evaluate potential environmental effects by suggesting that the effects are uncertain. *Scientists' Inst. for Public Info., Inc. v. Atomic Energy Comm'n*, 481

F.2d 1079, 1091-92 (D.C. Cir. 1973); *see also Conner v. Burford*, 848 F.2d 1441, 1450-51 (9th Cir. 1988).

Part II (page 15): Size and location of exploitation areas

Application of procedures substantially similar to NEPA would require the ISA to develop regulations that take a precautionary approach to the designation of areas to be exploited. NEPA mandates that actions cannot be pursued until the environmental effects of the proposed action are carefully evaluated. Such an evaluation requires the development of baseline data on the affected area. Thus ISA procedures with respect to applications for exploitation permits, if substantially similar to NEPA, must require detailed baseline assessments of the nature, status, and biodiversity of any area of the sea floor that is under investigation for possible future exploration, development, mining or other disturbance before any decision is made to authorize such activity. No exploitation of the seabed should be allowed to commence until both baseline assessments and environmental assessments are completed and reviewed by an independent authority, and until that authority issues a finding that exploitation can proceed under certain conditions. ***Principles should be established to help guide these findings; for example, the principles should include a presumption against mining in any case where the baseline assessment discovers new and unique life forms.***

Part II (page 18): Public Review of EIS and Environmental Management Plan

The ISA must ensure that its process for developing any regulatory regime with respect to exploitation of the Area is fully transparent and open to the public. In this regard, the ISA should be governed by the principles of both the Aarhus Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters (1998), and the Almaty Guidelines (2005) that promote the robust implementation of that Convention. As we explained in our May 14, 2014 comment letter, both the Aarhus Convention and the Almaty Guidelines grant the public certain rights, and impose on parties and public authorities certain obligations, regarding access to information, public participation, and access to justice.

Consonant with Aarhus Convention principles, the application process for possible mineral exploitation in the Area must be open to participation by observers and be transparent at all stages. Observers should be allowed at all relevant stages of the decision-making process, subject to specific limited exclusions that are formulated in conformance with the Almaty Guidelines. Those Guidelines require that there be a reasonable basis for any decision to exclude such participation according to transparent and clearly stated standards that are made available, if possible, in advance. Almaty Guidelines at ¶ 29.

In order to ensure that the process for seeking a permit to engage in mineral exploitation in the Area conforms to the public involvement and transparency standards required by the Aarhus Convention and Almaty Guidelines, the ISA must establish a special hearings panel to consider applications, receive and call for evidence, conduct hearings and make decisions, and provide an appellate process for challenges to the permit decision. The proceedings must be held in public, with only narrow parts dealing with commercially confidential financial matters allowed to be closed to the public, but not to participants in the hearing. Funding must be available for this process.

Part II (page 19): Independent technical expert working group

Independent verification procedures are essential. There must be a public comment period, following which assessments must be reviewed, taking into account the comments, with independent scientists and a range of stakeholders on review panels. Further investigations must be able to be pursued as necessary where shortcomings have been identified through the review process.

In the United States, the U.S. Environmental Protection Agency provides a form of independent review by evaluating draft environmental impact statements for quality control purposes and providing letters to preparing agencies that comment upon those statements. EPA has developed a rating system to guide this process:
http://www.epa.gov/compliance/nepa/comments/ratings.html

Similarly, in the context of fishery management in the United States, the National Oceanic and Atmospheric Administration (NOAA) and other institutions have relied upon an independent group of scientists to evaluate

population assessments. The Center for Independent Experts has reviewed a number of technical documents and provided input on their reliability: http://www.ciereviews.org/

The ISA should review both of these approaches as it develops criteria to evaluate the quality and utility of EISs and Environmental Management Plans.

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We expressly consent to make our personal contact details, and this submission, available to the public. Our information is as follows:

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In addition, we are interested in being contacted by the International Seabed Authority in connection with its work to develop a regulatory framework for mineral exploitation and seabed mining. In particular, we are interested in joining any stakeholder group assembled by the Authority on this general topic.

Thank you for considering these comments. We appreciate the opportunity to raise these issues and would be glad to discuss them with you. Please contact us if you have questions regarding any matters covered in this letter.

Very truly yours,

/s/ Stephen E. Roady

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