

**TEMPLATE FOR SUBMISSION OF TEXTUAL PROPOSALS DURING THE 28TH SESSION:
COUNCIL - PART II**

Please fill out one form for each textual proposal which your delegation(s) wish(es) to amend, add or delete.

1. Name of working group

Institutional matters

2. Name(s) of Delegation(s) making the proposal:

Federal Republic of Germany

The principle approach to this draft is co-sponsored by Germany, New Zealand and the Netherlands, with the joint understanding that more work needs to be done to refine this regulation.

3. Please indicate the relevant provision to which the textual proposal refers.

Draft Regulation 13

Red text is in original draft; **blue text** indicates Germany's textual proposals

4. Kindly provide the proposed amendments to the regulation or standard or guideline in the text box below, using the "track changes" function in Microsoft Word. Please only reproduce the parts of the text that are being amended or deleted.

Regulation 13

Assessment of Applicants ~~and applications~~

1.bis. The Commission shall take into account all information pursuant to Regulation 12 (4) and all applicable Standards and Guidelines when making its determinations under this Regulation.

1. The Commission shall determine ~~[under consideration of taking into account the comments made by members of the Authority and Stakeholders, any responses by the applicant and any additional information or comments provided by the Secretary General]~~ if whether the applicant Plan of Work and the accompanying plans and information:

(a) Documents that the applicant is a qualified applicant pursuant to ~~under~~ regulation 5;

(a bis) Are accompanied by a certificate of sponsorship;

(b) ~~Has~~ are prepared ~~the application~~ in conformity with these regulations, the applicable Standards and ~~[the applicable]~~ Guidelines;

(c) ~~Demonstrate that the applicant~~ has given the undertakings and assurances specified in regulation 7 (2);

(d) ~~Demonstrate that the applicant~~ and, if applicable, its parent company, its legal predecessor, senior management and controlling shareholders have satisfactorily discharged their ~~its~~ obligations to the Authority, including having a satisfactory record of past performance both within the Area;

(e) Demonstrate that the Applicant has ~~[or can demonstrate that it will have]~~ the financial and technical capability ~~[and capacity]~~ to carry out the Plan of Work, ~~[meet or exceed environmental performance obligations]~~ and to meet all obligations under an exploitation contract ~~[according to criteria defined by the Council];~~

~~(f) Has demonstrated the [economic] [commercial] viability of the mining project.~~

~~[(g) Has demonstrated, in relation to the accommodation of other activities in the Marine Environment, due diligence to:]~~

~~[(i) identify in service and planned submarine cables and pipelines in, or adjacent to, the area under application using the publicly available data and resources as listed in the Guidelines;]~~

~~[(ii) identify sea lanes in, or adjacent to, the area under application that are essential to international navigation;]~~

~~[(iii) identify areas of intense fishing activity in, or adjacent to, the area under application; and]~~

~~[(iv) where other marine users are identified in relation to the area under application, consult with those users to agree measures the Contractor will take to give reasonable regard to their activities (such as an easement, or a mining exclusion zone within a reasonable radius);]~~

~~[(h) Has demonstrated a satisfactory record of past performance both within the Area and in other jurisdictions.]~~

2. In considering the financial capability of an applicant, the Commission shall determine in accordance with the Standards and Guidelines whether:

(a) The Financing Plan is compatible with proposed Exploitation activities; and

(b) The applicant ~~[will be is]~~ capable of committing ~~or raising~~ sufficient financial resources to cover the estimated costs of the proposed Exploitation activities as set out in the proposed Plan of Work, and all other associated costs of complying with the terms of any exploitation contract, including:

(i) The payment of any applicable fees and other financial payments and charges in accordance with these regulations ~~in order to ensure that the project will benefit humankind as a whole;~~

(ii) The estimated costs of implementing the Environmental Management and Monitoring Plan and the Closure Plan ~~[and to restore and remediate the affected Marine Environment in case of a significant Incident];~~

(iii) Sufficient financial resources for the prompt execution and implementation of the Emergency Response and Contingency Plan; and

~~(c) Necessary access to~~ The applicant demonstrates that it will purchase insurance ~~products that are appropriate to the financing of exposure to risk~~ in accordance with ~~Good Industry Practice Regulation 36.~~

(d) The applicant has proposed an Environmental Performance Guarantee whose amount and form is assessed by the Commission to be adequate, and in conformity with the requirements of Regulation 26 and the relevant Standard, and taking into account any Finance Committee report or Guidelines.

2.3. In considering the technical capability of an applicant, the Commission shall determine in accordance with the Guidelines whether the applicant ~~[has provided sufficient information to demonstrate it] has~~ ~~[or will have]~~:

(a) Certification to operate under internationally recognised quality control and management standards;]

(a) *bis.* The necessary technical and operational capability to carry out the proposed Plan of Work in accordance with Good Industry Practice and Best Environmental Practices using

appropriately qualified and adequately supervised personnel;]

(b) The technology [knowledge and] procedures necessary to comply with the terms of the Environmental Management and Monitoring Plan [and] the Closure Plan, [and the applicable Regional Environmental Management Plan] including the technical capability to [identify and] monitor key environmental parameters [and ecosystem components so as to detect any adverse effects] and to modify management and operating procedures [as required to avoid the potential for Serious Harm] [when appropriate];

(c) Established the necessary risk assessment and risk management systems to effectively implement the proposed Plan of Work in accordance with Good Industry Practice, Best Available Techniques, [Best Available Scientific Information] and Best Environmental Practices and these regulations, including the technology and procedures to meet health, safety and environmental requirements for the activities proposed in the Plan of Work;

(d) The capability to respond effectively and expeditiously to Incidents, in accordance with the Emergency Response and Contingency Plan; and

(e) The capability [and capacity] to utilize and apply Best Available Techniques.

4. The Commission shall determine if the proposed Plan of Work [foreseeably contributes to realizing the benefits for [hu]mankind as a whole][complies with the fundamental policies and principles contained in regulation 2, and];

~~{(a) — Is technically achievable and [economically commercially] viable;}~~

~~{(b) — Reflects the economic life of the project;}~~

(c) Provides for the effective protection of human health and safety of individuals engaged in Exploitation activities [in accordance with the rules, regulations and procedures adopted by the Authority and by any other competent international organizations];

4.bis. The Commission shall determine if the proposed Plan of Work can

~~(e) Provides for Exploitation activities to be carried out with reasonable regard for other activities and measures in the Marine Environment pursuant to the obligations according to regulation 31 , [in line with article 87 and 147 of the Convention] including [inter alia] navigation, the laying of submarine cables and pipelines, [the right to maintain and repair existing submarine cables and pipelines], fishing and marine scientific research, [as referred to in article 87 of the Convention] [in accordance with the relevant Guidelines]; and.~~

(a) In making such determination, the Commission shall determine if the proposed Plan of Work has demonstrated due diligence in relation to the accommodation of other activities in the Marine Environment, including to:}

~~{(i) identify in-service and planned submarine cables and pipelines in, or adjacent to, the area under application using the publicly-available data and resources as listed in the Guidelines;}~~

~~{(ii) identify sea lanes in, or adjacent to, the area under application that are essential to international navigation;}~~

~~{(iii) identify areas of intense fishing activity in, or adjacent to, the area under application}; and~~

~~{(iv) identify any other activities in or adjacent to the Contract Area in accordance with Regulation 31, including marine scientific research activities, activities relating to marine genetic resources, and environmental protection measures and area-based management tools established or proposed by competent international organizations; and~~

~~(v) where other marine users are identified in relation to the area under application, consult with those users to agree measures the Contractor will take to give reasonable regard to their activities in accordance with Regulation 31 (such as an easement, or a mining exclusion zone within a reasonable radius); }~~

4.ter. (e) The Commission shall determine whether the draft plan of work and the accompanying plans and information ~~[Provides under]~~ ~~[demonstrates that]~~ ~~[Ensures through]~~ the Environmental Plans, ~~[will secure]~~ ~~[to secure]~~ for the effective protection of the Marine Environment pursuant to Article 145 and in accordance with the rules, regulations and procedures adopted by the Authority, [in particular the fundamental principles and the relevant policies under regulation 2] ~~[in particular the fundamental policies and procedures under regulation 2.]~~ [as well as the objectives and measures under the applicable Regional Environmental Management Plan] [taking into account the cumulative effects of all relevant activities [and climate change] will be ensured. For this purpose, the Commission shall determine whether the Plan of Work and accompanying plans and information demonstrate that:

(a) the draft plan of work is based on adequate environmental baseline data, in accordance with the applicable Standards and taking into account the relevant Guidelines;

(b) that the standards pursuant to regulation 45 are complied with;

(c) the objectives and measures of the applicable Regional Environmental Management Plan are fulfilled;

(c bis) the overarching goals and objectives as set by the Authority are complied with;

(c ter) the Plan of Work gives full effect to the precautionary principle or approach.

(d) The term effective protection referred to in sub-paragraph (e) implies that the activity will not cause, *inter alia*:

(iv) Significant adverse effect on air and water quality;

(v) Significant changes in atmospheric, terrestrial or marine environment;

(vi) Any loss of biodiversity or significant changes in the distribution, abundance or productivity or species of flora and fauna;

(vii) Further jeopardy to endangered or threatened species or populations of said species

(viii) Degradation, or risk of degradation to special biological, scientific, archaeological, or historical significance;

(ix) Significant adverse effect on climate of weather patterns.]

(d)bis. The term effective protection further implies that the activities proposed under a Plan of Work will meet the overarching environmental goal of sustaining marine (benthic and pelagic) ecosystem integrity including the physical, chemical, geological and biological environment, and contributes to restoring ecosystem integrity, as well as the following environmental objectives:

(i) Prevent loss of genetic diversity, species richness, habitat or community types, and structural complexity on a long-term basis;

(ii) Maintain the ability of populations to replace themselves, including ensuring population connectivity and the preservation of suitable habitat;

(iii) Prevent the degradation of ecosystem functions (e.g. the long-term natural productivity of habitats, elemental cycling, trophic relationships);

(iv) Protect ecosystems from contamination by pollutants generated during any phase of the mining process;

(v) Maintain resilience to prevent regime shift, and to support recovery from cumulative impacts, including mining, that can affect source populations and communities, connectivity corridors, life-history patterns and species distributions; and

(vi) Sustain ecosystem services, including carbon sequestration, recognizing that many are yet to be discovered.

[(f) Provides for the effective protection of the marine environment from harmful effects that may arise from the proposed activities, by assessing whether the proposed Plan of Work:

[(i) contains adequate environmental baseline data, in accordance with applicable Standards and taking into account Guidelines;]

[(ii) will not cause environmental impacts to any area designated by the Authority or other relevant authority as a protected area in terms that prohibit such impacted;]

[(iii) Gives rise to a non-negligible risk of pollution, damage to flora and fauna, or other harmful effects to ecosystem integrity (i.e. ecosystem structure or function) in a manner that:

(A) impairs the ability of affected populations to replace themselves; or

(B) degrades the long-term natural productivity of habitats or ecosystems; or

(C) causes, on more than a temporary basis, significant loss of species richness, habitat or community types.

[(iv) Gives rise to a non-negligible risk that it will undermine the protection and conservation of other natural resources of the Area.

In conducting this assessment, the Commission shall take into account and shall consider.)]

5. For the purposes of determining effective protection of the Marine Environment under regulation 13 (4) (e) and (f), the Commission must take into account:

- (a) Any Environmental Effects or impact on other activities of allowing the Exploitation activity;
- (b) All proposed mitigation and risk management measures;
- (c) An evaluation of harmful effects individually, in combination, as well as cumulatively, including effects from other activities in the area under application.
- (d) The effects on human health that may arise from Environmental Effects;
- (e) The importance of protecting the biological diversity and integrity of marine species, ecosystems and processes;
- (f) The importance of protecting rare and vulnerable ecosystems and the habitats of threatened species;
- (g) Traditional knowledge or cultural interests relevant to the area under application;
- (h) the matters set out at Regulation 46bis (2) (b);
- (i) The assessment framework for Mining Discharges as set out in the Guidelines;
- (j) Any relevant Standards and Guidelines developed in accordance with regulations 94 and 95.]

(5.bis. the Commission shall determine whether the draft plan of work and the accompanying plans and information demonstrate that the proposed activities will not interfere with any cultural rights or interests.)

6. When assessing a Plan of Work, the Commission shall apply the principles set out in regulation 44(a)-(c).]

7. In assessing a Plan of Work, the Commission shall determine whether the applicant is under the effective control of the sponsoring State[, according to applicable Guidelines], and whether the sponsoring State has enacted domestic legislation covering activities in the Area that:

- (a) is in force and applicable,

(b) provides available recourse through the domestic legal system in accordance with Article 235(2) of the Convention, and

(c) does not contain provisions that appear to exempt liability of the sponsored entity from a cause of action that may result from its conduct of activities in the Area.]

5. Please indicate the rationale for the proposal. [150 word limit]

Overarching comments:

Germany sees a need to redraft regulation 13 significantly. However, there are still various conceptual aspects across the regulations which need to be discussed before the text of regulation 13 can be progressed.

First: We argue that it is the application which needs to be assessed, not the applicant. If so, the whole regulation would have to be redrafted. We proposed relevant amendments in para 1 (a) to (d) as an example.

Second: In our view, regulation 13 stipulates the substantive conditions which an application needs to fulfil in order for approval to be granted. Therefore, these conditions need be considered by the Commission and the Council when making their decisions pursuant to regulations 15 and 16.

Third: To improve the clarity and structure of DR 13, Germany argues that the each paragraph should address one core category of considerations, e.g.:

Para 1: General considerations

Para 2: Financial capability

Para 3: Technical capability

Para 4: Benefits for humankind

Para 4bis: Other uses of the marine environment

Para 4ter: Environmental obligations (also incl. current para 5)

Para 5bis: Cultural rights (formulation should reflect outcome of intersessional WG)

Detailed comments:

Para 1.bis: We suggest including an overarching paragraph 1.bis that addresses the information which needs to be taken into account when assessing applications. This avoids having to repeat such reference throughout DR 13.

Para 1(d) and (h): Germany suggests integrating (h) into (d) and then deleting (d).

Para 1(g): Germany proposes to move this provision into a stand alone subsection on other marine uses (para 4bis).

Para 2(c): Germany suggests referring to the need to have insurance in accordance with DR 36.

Para 2(d): Germany supports the suggestion to ensure the adequacy of the Environmental Performance Guarantee.

Para 4.bis: Germany sees the need for a reference to the obligation of the contractor pursuant to regulation 31 with regard to potential other legitimate uses and measures, including marine scientific research. Other uses and measures should not be limited to cables, navigation, and fishing but should also extend to environmental protection measures and area-based management tools

established or proposed by competent international organizations. This is necessary to achieve a degree of cooperation between sectoral regimes and realize the objectives of the BBNJ Agreement.

Para 4.ter(a) – (c)bis: Germany suggests including text to ensure that a plan of work has to comply with standards pursuant to regulation 45, the objective and measures of the applicable REMP and overarching goals and objectives.

Para 4.ter(c)ter: Germany suggests adding a reference to the precautionary principle/approach in line with existing obligations of the Authority, Contractors, and States to apply precaution. This also reflects the 2011 Advisory Opinion of the Seabed Disputes Chamber.

Para 4.ter(d)bis: Germany suggests including overarching environmental goals and objectives into the Mining Code, which are to be operationalised inter alia through thresholds. These objectives offer qualitative criteria to determine what level of environmental harm deemed “acceptable” in accordance with Article 145 and will offer legal certainty to applicants and member States. Such clarity will support the aim of holding all applicants to the same standards, in accordance with the Convention. The proposed environmental goal reflects existing obligations under the Convention on Biological Diversity, BBNJ Agreement, and OSPAR Convention, as well as political commitments e.g. agreed at last year’s UN Oceans Conference (see e.g. A/CONF230/2022/12, para 7). The reference to *contributing to the restoration of ecosystem integrity* is wording from Art. 7 of the BBNJ agreement. Germany is open to placing these goals and objectives elsewhere in the Regulations, as long as they form a benchmark for the Commission in assessing applications.

Para 5.bis: Germany suggests adding a separate paragraph on legitimate cultural or traditional rights, similar to the BBNJ Agreement. The language should be updated once the relevant intersessional WG has concluded its work.