

**TEMPLATE FOR SUBMISSION OF TEXTUAL PROPOSALS DURING THE 29TH SESSION:
COUNCIL - PART II**

Please fill out one form for each textual proposal which your delegation(s) wish(es) to amend, add or delete and send to council@isa.org.jm.

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

The Pew Charitable Trusts

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

44

3. 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.

1. The Authority, Sponsoring States, the Enterprise, Contractors, flag [and port States where they are members of the Authority] [and the States of registry of or having authority over installations, structures, robots, and other devices] within their respective competence shall take necessary measures to ensure effective Protection of the Marine Environment from harmful effects which may arise [directly or indirectly] from Exploitation ~~in the Area~~, in accordance with Regulations as well as applicable Standards and taking into consideration 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 and an ecosystem-based management [approach to ~~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, Mitigation 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 Best Available Scientific Information and [where available, relevant traditional knowledge of Indigenous Peoples and local communities] in decision making;~~

(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];

(e) 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 to the Mmarine Eenvironment are not transferred, [directly or indirectly, from one area of the environment to another or from one type of pollution into another one. 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 mitigation and ~~to minimise impact on avoidance of impacts on~~ the ocean's capacity to function as a climate 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. ~~Nothing in these regulations. No Regulation in this Part~~ 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. Please indicate the rationale for the proposal. [150-word limit]

In the chapeau to paragraph 1, we note that the wording '*within their respective competence*' has been removed and wonder if its reinsertion would be helpful to clarify that the Regulations are not seeking to over-reach in asking other actors or States to take on duties that fall more properly within the competence of the ISA or the sponsoring State, for example.

In the chapeau, the wording '*as well as Standards and taking into consideration Guidelines referred to in Regulation 45*' seems to imply that only Standards and/or Guidelines referred to in DR45 apply to this regulation, which we believe is incorrect, as Standards and Guidelines relevant to this DR44(alt) may also be produced pursuant to DR 94 ('Adoption of Standards') and DR95 ('Issue of Guidelines').

It is hard to understand the different proposals captured in sub-paragraph (1)(a), and how they inter-relate to make a coherent text. Our suggested amendments include adding the defined term 'Mitigation' which addresses both avoidance and minimising. This small amendment to sub-paragraph (1)(a) would also enable deletion of sub-paragraph (g) as duplicative.

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 term 'Ecosystem based management approach' in DR2.

Similarly, in DR2, '*precautionary principle or precautionary approach as appropriate*' has been proposed (in line with the approach taken in the BBNJ agreement), but in this DR44(1)(a) we have '*the precautionary approach*'.

In paragraph (1)(b), 'Best Available Techniques' may be deleted if that term is included within the definition of 'Best Environmental Practices' in the Schedule to the Regulations which we believe is the intention. Though currently in the Schedule, the definition for 'Best Environmental Practices' includes 'Best Available Technology', which may be a drafting error, as that is not a defined term nor used elsewhere in the Regulations?

We support the reference to sufficiency of information in sub-paragraph (b). This is an important criterion to understand confidence levels in the information on which decisions are being taken. We are understand that observer Deep Ocean Stewardship Initiative (DOSI) are working on a paper and proposals on this, for the Council's information. We do wonder though whether this reference would be better integrated in the Schedule under the term Best Environmental Practice.

The references to “*Exploitation in the Area*” in paragraph 1 and sub-paragraphs 1(a) and 1(d) to this regulation do not align with the defined term for ‘Exploitation’ in the Schedule to the Regulations, which specifies ‘the Area’ and identifies activities that may occur in the surrounding marine environment. “Exploitation” is sufficient. We also believe it is duplicative to keep it in the sub-paragraphs if it is already included in the chapeau.

We strongly support the retention of sub-paragraph (d) in line with regards accountability and transparency. We would prefer the term ‘public participation’ over ‘stakeholder engagement’, as better demonstrating relevant international law obligations. Along these lines we wonder if this would be the appropriate place to list all the three pillars of sound environmental governance. Alternatively, if ‘stakeholder’ can be capitalised here, to bring the defined term into the sub-paragraph, then this could also avoid inadvertent narrowing of the scope of this sub-paragraph.

We suggest the wording in sub-paragraph (e) for the ‘polluter pays’ principle should be consistent with other uses in the Regulations (e.g. DR2, DR55, DR56). These currently refer to the ‘polluter pays principle’ without qualification. We think the ‘public interest’ factor is already encompassed in the principle, which requires the costs of preventing, controlling, or cleaning-up pollution (or compensating for damage caused by pollution) to be borne by the entities that create the pollution (and not the public).

We support inclusion of sub-paragraph 1(f) and its adherence to the wording of UNCLOS Article 195. 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. As a drafting note, the reference to “marine environment”, as a defined term, should be capitalised in sub-paragraph 1(f) and throughout this document.

As noted above, the defined term ‘Mitigate’ (in the Schedule to the Regulations) already explains the full range of options within the mitigation hierarchy. Sub-paragraph (g) and (i) contains redundant and potentially inconsistent wording. The whole sub-paragraph should be replaced by ‘Mitigate environmental harm caused by activities in the Area’ or deleted altogether (with the word ‘Mitigate’ added instead to sub-paragraph (a) as we suggest, above).

We support sub-paragraph (h) in relation to climate mitigation but have offered some editorial points to be more consistent with the chapeau.

This wording in paragraph (3) is inconsistent with the rest of the Regulations, and with UNCLOS (e.g. Annex III Art 22). We are unclear why the provision would apply to sponsoring States only, and not the other categories of States identified in the chapeau of DR44.